(16,807.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 594.

MAUDE E. KIMBALL, PLAINTIFF IN ERROR,

vs.

HARRIET A. KIMBALL, JOHN S. JAMES, AND HARRIET I. JAMES.

IN ERROR TO THE SURROGATE'S COURT OF THE COUNTY OF KINGS STATE OF NEW YORK.

INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., MARCH 8, 1898.

a Court of Appeals, State of New York.

In the Matter of the Application for Letters of Administration of the Goods, Chattels, and Credits which were of EDWARD C. KIMBALL, Deceased, &c.

Papers on appeal from order.

W. Harlock, attorney for Maude E. Kimball, petitioner and appellant, 20 Nassau street, New York city.
Arnold & Greene, attorneys for Harriet A. Kimball and others, respondents, 3 Broad street, New York city.

1 In the Supreme Court, Appellate Division, Second Judicial Department.

In the Matter of the Application for Letters of Administration of the Goods, Chattels, and Credits which were of EDWARD C. KIMBALL, Deceased, and for the Revocation of the Letters Issued to HARRIET A. KIMBALL and JOHN S. JAMES on the 10th Day of November, 1896.

Statement under Rule 41.

This proceeding was begun December 18, 1896.
The petition was served December 21, 1896.
The answer was served January 6, 1897.
The reply was served January 20, 1897.
The name of the original petitioner is Maude E. Kimball.
The names of the original respondents are Harriet A. Kimball and John S. James, as administratrix and administrator, &c., of Edward C. Kimball, deceased, and Harriet I. James.
There has been no change of the parties.

2 At a surrogate's court, held in and for the county of Kings, at the surrogate's court-room, in the hall of records, in the city of Brooklyn, on the 18th day of December, 1896.
Present: Hon. George B. Abbott, surrogate.

In the Matter of the Application for Letters of Administration of the Goods, Chattels, and Credits which were of EDWARD C. KIMBALL, Deceased, and for the Revocation of the Letters Issued to HARRIET A. KIMBALL and JOHN S. JAMES on the 10th Day of November, 1896.

Order for Citation.

On reading and filing the verified petition of Maude E. Kimball praying for a decree revoking letters of administration of the goods, chattels and credits which were of said deceased to Harriet A. Kimball and John S. James, issued to them by the surrogate of Kings county on the 10th day of November, 1896, and praying that letters of ad-

ministration be issued to her, the said Maude E. Kimball, and that a citation issue to the parties interested, and upon proof by the affidavits of Maude E. Kimball, Mame F. Cavendy and William B. Smith annexed to said petition, satisfactory to me, of the truth of the allegations contained therein, and on the petition and all the proceedings heretofore had upon the granting of said letters to Harriet A. Kimball and John S. James—

It is hereby ordered that a citation issue herein to the said Harriet A. Kimball and John S. James and Harriet I. James
3 requiring them to show cause, on a day and hour to be named in said citation, before the surrogate of Kings county, why the prayer of said petition of said Maude E. Kimball should not be granted, and why the petitioner should not have such other relief as may be just; and in the meantime, and until further order herein, all proceedings on the part of said Harriet A. Kimball and John S. James, or either of them, as such administratrix and administrator, are hereby stayed, and let such citation so provide.

GEO. B. ABBOTT, *Surrogate.*

Kings County Surrogate's Court.

In the Matter of the Application for Letters of Administration of the Goods, Chattels, and Credits which were of EDWARD C. KIMBALL, Deceased, and for the Revocation of the Letters Issued to HARRIET A. KIMBALL and JOHN S. JAMES on the 10th Day of November, 1896.

Petition to Revoke Letters of Administration.

To the surrogate's court of the county of Kings:

The petition of Maude E. Kimball respectfully shows:

That your petitioner is a resident of No. 1170 Dean street, in the city of Brooklyn, in the county of Kings, in the State of New York, and is the widow of said Edward C. Kimball, deceased, and is of full age.

4 That said deceased departed this life at the city of Brooklyn aforesaid on the ninth day of November, 1896, and was at the time of his death, and immediately previous thereto, a resident of the county of Kings.

That your petitioner has made diligent search and inquiry for a will of said deceased, but has not found any, nor obtained any information that he left any; and she therefore alleges, upon information and belief, that said deceased died without leaving any last will and testament.

That said deceased died a natural death and that your petitioner saw the remains of said deceased after his death.

That said deceased, at the time of his death, was possessed and the owner of certain personal property, the value of which does not exceed the sum of ten thousand dollars.

That said deceased, at the time of his death, was seized of real estate the value of which is about four thousand dollars, which real

estate is subject to the dower interest of Harriet A. Kimball, the mother of said deceased.

That the names of the next of kin of the decedent, as far as they are known to your petitioner, or can be ascertained by her with due diligence, are as follows: Harriet A. Kimball, the mother of said deceased, and Harriet I. James (wife of John S. James), the sister of said deceased, both of whom reside at No. 6 Pierrepont street, in the city of Brooklyn.

That said deceased left him surviving no father, child, adopted child, child of a deceased child, brother or sister other than said Harriet I. James, and no nephew or niece, the child of any deceased brother or sister.

That your petitioner has read the petition herein of said Harriet A. Kimball, dated November 10th, 1896, upon which said letters of administration were issued to her and said John S. James, and your petitioner alleges that the statement in said petition in the words, "and your petitioner is informed and believes that he (meaning decedent) was unmarried at the time of his death and left him surviving no widow," was and is false and untrue, and that said Harriet A. Kimball well knew that the same was false and untrue at the time she made and verified said petition.

That your petitioner is the lawful widow of the said Edward C. Kimball, deceased, and was not a party to the proceedings had upon the said petition of Harriet A. Kimball as aforesaid, and knew nothing about the same prior to the issuing of said letters of administration to said Harriet A. Kimball and John S. James, and that no citation was ever issued or served upon your petitioner in the matter of said application of Harriet A. Kimball.

That your petitioner was duly married to the said Edward C. Kimball, deceased, according to the laws of the State of New York, at No. 400 Putnam avenue, in the said city of Brooklyn, on the 29th day of June, 1895, by the Reverend W. C. P. Rhoades, pastor of the Marcy Avenue Baptist church of the city of Brooklyn, a minister of the gospel duly authorized by law to perform the ceremony of marriage, and your petitioner remained the wife of said Edward C. Kimball until his death on the 9th day of November, 1896.

That after her said marriage your petitioner and the said Edward C. Kimball lived together as man and wife as follows: At Seacliff, Long island, during the summer and until about September 7th, 1895, when the decedent and your petitioner went to housekeeping at No. 483 Decatur street, Brooklyn, N. Y., where they lived together until about January 3d, 1896, at which last-mentioned date the decedent went to Easton, Pennsylvania, to engage in business there, and owing to his failure to support your petitioner, she was compelled to return to her mother's home about that time.

That immediately after the marriage aforesaid, your petitioner was introduced to the decedent's mother, Harriet A. Kimball, by the decedent, as his wife. That said Harriet A. Kimball always treated your petitioner affectionately and cordially, and for several months in the fall of 1895 she dined once a week at your petitioner's home,

at No. 483 Decatur street aforesaid, with your petitioner, and
6 on each of said visits she remained several hours. That said Harriet A. Kimball gave your petitioner various articles of silverware and of household furnishings for use in her said home, also some pictures, including a portrait of herself, taken when she was fifteen years old, and a portrait of her grandmother; and at her request your petitioner visited her several times at her residence, and was introduced there by said Harriet A. Kimball to her friends and acquaintances as the wife of her son, the decedent.

Wherefore, your petitioner prays for a decree revoking the said letters of administration heretofore issued to Harriet A. Kimball and John S. James, and awarding to your petitioner letters of administration of the goods, chattels, and credits which were of said deceased; and that said Harriet A. Kimball and John S. James and Harriet I. James, the sister of said deceased, may be cited to show cause why such a decree should not be made, and why your petitioner should not have such further and other relief as may be meet; and that in the meantime and until the further order of this court, the said Harriet A. Kimball and John S. James, and each of them, be restrained and enjoined from further acting as administratrix and administrator respectively in the premises.

Dated the 17th day of December, 1896.

MAUDE E. KIMBALL, *Petitioner.*

WALDEGRAVE HARLOCK,
Attorney for Petitioner, 20 Nassau Street, New York City.

STATE OF NEW YORK, }
City and County of New York, } *ss:*

Maude E. Kimball, the above-named petitioner, being duly sworn, doth depose and say that she has read the foregoing petition subscribed by her, and that the same is true of her own knowledge, except as to the matters therein stated to be alleged on infor-
7 mation and belief, and as to those matters she believes it to be true. MAUDE E. KIMBALL.

Subscribed and sworn — before me this 17th day of December, 1896.

F. W. LONGFELLOW,
Notary Public (55), *New York County, N. Y.*

Kings County Surrogate's Court.

In the Matter of the Application for Letters of Administration of the Goods, Chattels, and Credits which were of EDWARD C. KIMBALL, Deceased, and for the Revocation of the Letters Issued to HARRIET A. KIMBALL and JOHN S. JAMES on the 10th Day of November, 1896.

Affidavit in Support of Petition.

CITY AND COUNTY OF NEW YORK, *ss.:*

Maude E. Kimball, being duly sworn, says: I am the petitioner herein, and I hereby repeat and reaffirm all the allegations in the petition herein verified by me this day.

I reside at No. 1170 Dean street, in the city of Brooklyn, Kings county, New York, and am the widow of Edward C. Kimball, deceased, and am of full age.

Said Edward C. Kimball died at the said city of Brooklyn
8 on the 9th day of November, 1896, intestate, and leaving him surviving no child or other descendant, and his only next of kin are his mother, Harriet A. Kimball, and his sister, Harriet I. James, both of whom reside in the said city of Brooklyn. At the time of his death he was the owner of personal property of the value of about $10,000 and had an interest in real estate of the value of about $3,000.

Letters of administration on the estate of said Edward C. Kimball were issued by the surrogate of Kings county on the 10th day of November, 1896, to said Harriet A. Kimball and to John S. James upon the petition of said Harriet A. Kimball, without notice or citation to me or my consent; and said petition of Harriet A. Kimball contains a false suggestion of a material fact, to wit, the allegation "that the deceased was unmarried at the time of his death, and left him surviving no widow."

I was duly married to said Edward C. Kimball on the 29th day of June, 1895, at No. 400 Putnam avenue, in the said city of Brooklyn, by the Reverend W. C. P. Rhoades, pastor of the Marcy Avenue Baptist church, a minister of the gospel duly authorized by law to perform the ceremony of marriage, and the said marriage was performed in the presence of W. B. Smith and Miss M. F. Cavendy; and at the time thereof the said the Reverend W. C. P. Rhoades delivered to me a certificate of said marriage signed by him, and also signed by said W. B. Smith and Miss M. F. Cavendy as witnesses thereto, which certificate was in the words and figures following, viz:

"This certifies that on the twenty-ninth day of June, in the year of our Lord 1895, Edward C. Kimball and Maude E. Semon were by me united in marriage at 400 Putnam avenue, Brooklyn, according to the laws of the State of New York.

"W. C. P. RHOADES.

"Witnesses:

"W. B. SMITH.

"Miss M. F. CAVENDY."

9 Said Edward C. Kimball and I lived together as man and wife from and after said marriage, and said marriage was never dissolved or annul-ed, and at the time of the death of said Edward C. Kimball I was his lawful wife.

After our said marriage my husband, said Edward C. Kimball, and I lived together as man and wife as follows: At Seacliff, Long island, during the summer and until about September 7th, 1895, when we went to housekeeping at No. 483 Decatur street, Brooklyn, in a house owned by my own mother and furnished mostly by her for the use of myself and my said husband, where we lived until about January 3d, 1896, when my husband went to Easton, Pennsylvania, to engage in business there. As my husband was not successful in business I was compelled to close said Decatur Street house and go to live with my mother about February 1st, 1896.

Immediately after our marriage, as aforesaid, I was introduced to the said Harriet A. Kimball by my said husband as his wife and she visited us at Seacliff and also at our home at No. 483 Decatur street aforesaid. Said Harriet A. Kimball always treated me with respect and affection, and while we were living at our Decatur Street home said Harriet A. Kimball dined with us there on the Tuesday of almost every week, and stayed with us until late in the evening. She gave to me as presents for use in our said home some of her family pictures including a portrait of herself taken when she was a girl of about fifteen years, and also a picture of her own grandmother. She also gave me for like use some silverware, which had been in her family for many years, consisting of a tea set, cake basket and butter dish, also blankets, sheets, towels, lace curtains, and other things for housekeeping.

At the request of said Harriet A. Kimball I visited her at her residence in Third street, Brooklyn, with my husband, and was introduced by her there as the wife of said Edward C. Kimball to several old friends and acquaintances of her family.

10 After my said husband went to Easton, as aforesaid, said Harriet A. Kimball called on me at our Decatur Street home about once a week, and told me that she did so for the purpose of cheering me up during my husband's absence.

MAUDE E. KIMBALL.

Subscribed and sworn to before me this 17th day of December, 1896.

F. W. LONGFELLOW,
Notary Public (55), *New York County, N. Y.*

Kings County Surrogate's Court.

In the Matter of *of* the Application for Letters of Administration of the Goods, Chattels, and Credits which were of EDWARD C. KIMBALL, Deceased, and for the Revocation of the Letters Issued to HARRIET A. KIMBALL and JOHN S. JAMES on the 10th Day of November, 1896.

Affidavit in Support of Petition.

STATE OF NEW YORK, }
City and County of New York, } ss:

Mame F. Cavendy, of the city of Brooklyn, being duly sworn, deposes and says that she is well acquainted with Maude E. Kimball, the petitioner herein, and was also well acquainted with her deceased husband, Edward C. Kimball, during his lifetime, and was, on the 29th day of June, 1895, at the residence of the
11 Reverend W. C. P. Rhoades, the pastor of the Marcy Avenue Baptist church, in the city of Brooklyn, and was present at the marriage by the said the Reverend W. C. P. Rhoades of the said Maude E. Kimball to the said Edward C. Kimball at said time and place, and that deponent subscribed her name on the certificate of said marriage, signed by said pastor, as a witness thereof.

Deponent further says that William B. Smith, who was also present at said marriage, likewise subscribed his name on said certificate of marriage as a witness thereof.

MAME F. CAVENDY.

Subscribed and sworn to before me this 17th day of December, 1896.

WM. H. H. PINCKNEY,
Notary Public, Kings County.

Kings County Surrogate's Court.

In the Matter of the Application for Letters of Administration of the Goods, Chattels, and Credits which were of EDWARD C. KIMBALL, Deceased, and for the Revocation of the Letters Issued to HARRIET A. KIMBALL and JOHN S. JAMES on the 10th Day of November, 1896.

Affidavit in Support of Petition.

STATE OF NEW YORK, }
City and County of New York, } ss:

William B. Smith, of the city of New York, being duly
12 sworn, deposes and says that he is well acquainted with Maude E. Kimball, the petitioner herein, and was also well acquainted with her deceased husband, Edward C. Kimball, during his lifetime, and was on the 29th day of June, 1895, at the residence of the Reverend W. C. P. Rhoades, the pastor of the Marcy Avenue Baptist church, in the city of Brooklyn, and was present at the marriage by the said Reverend W. C. P. Rhoades of the said Maude

E. Kimball to the said Edward C. Kimball at said time and place, and that deponent subscribed his name on the certificate of said marriage signed by said pastor as a witness thereof.

Deponent further says that Mame F. Cavendy, who was also present at said marriage, likewise subscribed her name on said certificate of marriage as a witness thereof.

W. B. SMITH.

Subscribed and sworn to before me this 17th day of December, 1896.

WILLIAM FRANCIS CAREY,
Notary Public (95), *N. Y. Co.*

Citation.

The People of the State of New York, by the grace of God free and independent, to Harriet A. Kimball and John S. James, as administratrix and administrator of the goods, chattels, and credits which were of Edward C. Kimball, deceased, and to Harriet I. James, sister of said deceased, send greeting:

You, and each of you, are hereby cited and required to appear before our surrogate of the county of Kings, at a surrogate's court of the county of Kings, to be held at the Hall of Records, in the city of Brooklyn, on the sixth day of January, 1897, at ten
13 o'clock in the forenoon, then and there to show cause why a decree should not be made revoking the letters of administration of the goods, chattels and credits which were of said Edward C. Kimball, deceased, heretofore and on the 10th day of November, 1896, issued to said Harriet A. Kimball and John S. James by the surrogate's court of the county of Kings; and why letters of administration on the estate of said deceased Edward C. Kimball should not be issued to Maude E. Kimball, as the widow of said deceased. And in the meantime, and until the further order of said court, all proceedings on the part of said Harriet A. Kimball and John S. James, or either of them, as such administratrix and administrator, are hereby stayed.

In testimony whereof, we have caused the seal of our said surrogate's court to be hereunto affixed.

[L. S.] Witness, Hon. George B. Abbott, surrogate of our said county, at the city of Brooklyn, the nineteenth day of December, in the year of our Lord one thousand eight hundred and ninety-six.

JOSEPH W. CARROLL,
Clerk of the Surrogate's Court.

Proof of Service.

STATE OF NEW YORK, }
City and County of New York, } ss.:

Rudolph H. Ehrsam, being duly sworn, deposes and says that he resides at No. 172 East Eighty-seventh street, in the city of New

York, and is over twenty-one years of age. That on the twenty-first day of December, 1896, deponent served the within citation upon Harriet A. Kimball and Harriet I. James, two of the persons mentioned in said citation, at No. 6 Pierrepont street, in the
14 city of Brooklyn, Kings county, and upon John S. Jaems, one of the persons mentioned in said citation, at No. 10 Wall street, in the city of New York, in the county of New York, by delivering to and leaving with each of said persons a copy of said citation, and at the same time exhibiting to each of said persons the original citation within, and at the same time deponent delivered to each of said persons a copy of the order of the surrogate's court of the county of Kings, made herein, bearing date the 18th day of December, 1896, directing that the said citation issue, and at the same time deponent also delivered to each of said persons a copy of the petition and affidavit of Maude E. Kimball and affidavits of Mame F. Cavendy and William B. Smith, referred to in said order and annexed thereto; deponent further says that he knew the said Harriet A. Kimball, Harriet I. James and John S. James, served by him as aforesaid, to be the persons mentioned in said citation, and to whom it was addressed.

RUDOLPH H. EHRSAM.

Subscribed and sworn to before me this 21st day of December, 1896.

F. W. LONGFELLOW,
Notary Public (55), *New York County, N. Y.*

15 Kings County Surrogate's Court.

In the Matter of the Application for Letters of Administration of the Goods, Chattels, and Credits which were of EDWARD C. KIMBALL, Deceased.

Petition of Harriet A. Kimball for Administration.

To the surrogate's court of the county of Kings:

The petition of Harriet A. Kimball respectfully shows:

That your petitioner is a resident of No. 6 Pierrepont street, in the city of Brooklyn, and is the mother of the said Edward C. Kimball, deceased, and is of full age.

That said deceased departed this life at the city of Brooklyn on the ninth day of November, 1896, and was at, or immediately previous*ly* to his death, a resident of the county of Kings.

That your petitioner has made diligent search and inquiry for a will of said deceased and has not found any or obtained any information that he left any, and, therefore, alleges upon information and belief that said deceased died without leaving any last will and testament.

That said deceased died a natural death, and that your petitioner saw the remains of said deceased after his death.

That said deceased at the time of his death was possessed and the

owner of certain personal property, the value of which does not exceed the sum of ten thousand dollars.

16 That said deceased at the time of his death was seized of real estate, the value of which is about four thousand dollars, which real estate is subject to your petitioner's dower interest.

That the names of the husband or widow and the next of kin of the decedent, as far as they are known to your petitioner or can be ascertained by her with due diligence, are as follows:

Harriet A. Kimball, your petitioner, who is the mother of said deceased, and Harriet I. James, wife of John S. James, the sister of said deceased.

Said deceased left him surviving no father, children, adopted child, child of a deceased child, brother or sister, other than said Harriet I. James, and no nephew or niece, the child of any deceased brother or sister, and your petitioner is informed and believes that he was unmarried at the time of his death and left him surviving no widow.

That said Harriet I. James has renounced any right she may have to letters of administration of the goods, chattels and credits of said deceased.

Your petitioner, therefore, prays for a decree of the surrogate's court of the county of Kings, awarding letters of administration of the goods, chattels and credits which were of said deceased to her and to said John S. James, who, deponent prays, may be joined with her as administrator of said goods, chattels and credits of said deceased.

Dated the 10th day of November, 1896.

HARRIET A. KIMBALL.

STATE OF NEW YORK, } ss:
County of Kings, }

Harriet A. Kimball, the above-named petitioner, being duly sworn, doth depose and say, that she has read the foregoing petition subscribed by her, and that the same is true of her own

17 knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters she believes it to be true.

HARRIET A. KIMBALL.

Subscribed and sworn this 10th day of November, 1896.

EDWARD J. BERGEN,
Notary Public.

STATE OF NEW YORK, } ss:
County of Kings, }

We, Harriet A. Kimball and John S. James, do solemnly swear and declare that we will well, faithfully and honestly discharge the duties of administratrix and administrator of the goods, chattels and credits which were of Edward C. Kimball, deceased, according to law.

HARRIET A. KIMBALL.
JOHN S. JAMES.

Subscribed and sworn this 10th day of November, 1896.
EDWARD J. BERGEN,
Notary Public.

18 Kings County Surrogate's Court.

In the Matter of the Applicant for Letters of Administration of the Goods, Chattels, and Credits which were of EDWARD C. KIMBALL, Deceased.

Renunciation.

I, Harriet I. James, wife of John S. James, of No. 6 Pierrepont street, in the city of Brooklyn, and sister of said Edward C. Kimball, late of the county of Kings, State of New York, deceased, do hereby renounce all right to letters of administration on the goods, chattels and credits which were of said deceased.

Dated the 10th day of November, 1896.

HARRIET I. JAMES.

STATE OF NEW YORK, *County of Kings,* } ss.:

On this tenth day of November, in the year 1896, before me personally came Harriet I. James, known to me to be the person described in, and who executed the foregoing renunciation, and acknowledged to me that she executed the same.

EDWARD J. BERGEN,
Notary Public.

19 At a surrogate's court held in and for the county of Kings, at the surrogate's court-room, in the hall of records, in the city of Brooklyn, on the tenth day of November, in the year one thousand eight hundred and ninety-six.

Present: Hon. George B. Abbott, surrogate.

In the Matter of the Application for Letters of Administration of the Goods, Chattels, and Credits which were of EDWARD C. KIMBALL, Deceased.

Decree Granting Administration.

On reading and filing the verified petition of Harriet A. Kimball praying for a decree awarding letters of administration of the goods, chattels and credits which were of said deceased to her and to John S. James, of No. 6 Pierrepont street, Brooklyn, and Harriet I. James, the only other person appearing to have a right to letters of administration of the said goods, chattels and credits, having renounced such right, and on reading and filing the bond executed by said administratrix and administrator with competent sureties, conditioned faithfully to execute the trusts reposed in her and him as such administratrix and administrator, and to obey all orders of the surrogate of the county of Kings, touching the administration committed to her and him, and this court being satisfied that said Harriet A. Kimball and John S. James are in all respects competent to act as

such administratrix and administrator, does hereby order and decree that letters of administration of the goods, chattels and
20 credits which were of said deceased be awarded to the said petitioner and to said John S. James.

GEO. B. ABBOTT, *Surrogate.*

Surrogate's Court, Kings County.

In the Matter of the Application for Letters of Administration on the Goods, Chattels, and Credits which were of EDWARD C. KIMBALL, Deceased, and for the Revocation of Letters Issued to HARRIET A. KIMBALL and JOHN S. JAMES on the 10th Day of November, 1896.

Answer of Respondents.

The answer of Harriet A. Kimball, John S. James and Harriet I. James, by Arnold & Greene, their attorneys to the petition of Maude E. Kimball, the petitioner herein, respectfully shows to the court:

They deny, on information and belief, that the said petitioner is the widow of said Edward C. Kimball, deceased.

They admit that said Edward C. Kimball, deceased, departed this life at the city of Brooklyn on the 9th day of November, 1896, and was at the time of his death and immediately previous thereto a resident of the county of Kings and State of New York.

They admit that said Edward C. Kimball died a natural death, without leaving any last will and testament.

21 They admit that said Edward C. Kimball, deceased, was at the time of his death the owner of certain personal property, the value of which does not exceed the sum of $10,000, and that he was seized at the time of his death of an undivided interest in certain real estate situated in the city of Brooklyn, the value of which is unknown to them, which real estate is subject to the dower interest of said Harriet A. Kimball, the mother of said deceased.

They admit that the next of kin of said Edward C. Kimball, deceased, are Harriet A. Kimball, the mother of said deceased, and said Harriet I. James, the sister of said deceased, both of whom reside at No. 6 Pierrepont street in the city of Brooklyn. They also admit that said deceased left him surviving no father, child, adopted child, child of deceased child, brother or sister, other than the said Harriett I. James, and no niece or nephew, the child of any deceased brother or sister.

They deny, on information and belief, that the statements in the petition made by said Harriet A. Kimball and John S. James for letters of administration of the estate of Edward C. Kimball, deceased, to the effect that the said Edward C. Kimball was unmarried at the time of his death and left him surviving no widow, are false and untrue, or that said Harriet A. Kimball well knew that the same were false and untrue at the time she made and verified such petition for letters of administration.

They admit that the said Edward C. Kimball, deceased, and the said petitioner went through a ceremony of marriage in the said city of Brooklyn on the 29th day of June, 1885, and they admit that

said Edward C. Kimball and the petitioner lived together thereafter at various places, but they allege that before the death of said Edward C. Kimball he separated from the petitioner, and was not living with her at the time of his death.

They further allege, on information and belief, that on the 12th day of May, 1885, the petitioner and one James L. Semon intermarried in the city of New York, according to the laws of the
22 State of New York; that thereafter and in the month of September, 1890, the said petitioner commenced an action in the district court, fifth judicial district of the State of North Dakota, county of Barnes, against said James L. Semon for a divorce; that the said James L. Semon was, when said action for a divorce was commenced, and ever since has been, a resident of the State of New York; that an order for the service of said summons by publication on said James L. Semon was made in said action by Hon. Roderick Rose, judge of said court, on the 30th day of September, 1890; that the summons in said action was not served upon said James L. Semon personally within the State of North Dakota, but was served upon him by leaving a copy thereof with him in the city of New York on the 15th day of October, 1890; that said James L. Semon did not appear in said action, and did not answer or demur to the complaint, and that such proceedings were thereafter had in said action on the part of the plaintiff that on the 26th day of January, 1891, the said court made a decree whereby it recited the service of the summons and complaint on said Semon in the State of New York, that he did not appear in said action or serve any answer or demurrer therein, and thereupon upon his default it was ordered, adjudged and decreed that the bonds of matrimony entered into between said petitioner and the said James L. Semon be dissolved, and the said parties and each of them freed and absolutely released from the bonds of matrimony and all the obligations thereof; that by reason of the facts that the said James L. Semon was at the time of the pendency of said action a resident of the State of New York; that he did not appear in said action or answer or demur to the complaint therein, and was not served with the summons in said action in the State of North Dakota, the said district court of North Dakota did not acquire jurisdiction of said James L. Semon in said action, and the said decree of divorce was and is absolutely null and void in the State of New York, and the said petitioner at the
23 time of her alleged marriage to the said Edward C. Kimball was, according to the laws of the State of New York, the wife of said James L. Semon, and could not lawfully enter into a contract of marriage with the said Edward C. Kimball, and the said alleged contract of marriage between them was absolutely null and void, and of no effect.

They further allege, on information and belief, that on the death of the said Edward C. Kimball all the property left by him in said State of New York passed, under the laws of that State, to the said Harriet A. Kimball, his mother, and the said Harriet I. James, his sister, as his only next of kin and heirs-at-law; that said Harriet A. Kimball, his mother, was entitled to apply for and receive letters of

administration, and that the said petitioner has no interest whatever in the real or personal estate left by said Kimball, as his widow or otherwise, and has no right to letters of administration upon his estate.

Hereto annexed is a copy of the judgment-roll in the said action of divorce brought in the said district court, fifth judicial district of the State of North Dakota, county of Barnes, by said petitioner against James L. Semon for a divorce as aforesaid.

Wherefore the said Harriet A. Kimball, John S. James and Harriet I. James pray that said petition be dismissed with costs.

Dated January 4th, 1897.

ARNOLD & GREENE,
Attorneys for said Harriet A. Kimball, John S. James, and Harriet I. James, 3 Broad Street, New York, N. Y.

COUNTY OF KINGS, *ss:*

Harriet A. Kimball, John S. James and Harriet I. James, being severally duly sworn, deposes and says, each for himself and
24 herself, as follows: I have read the foregoing answer, and the same is true of my own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters I believe it to be true.

HARRIET A. KIMBALL.
JOHN S. JAMES.
HARRIET I. JAMES.

Sworn to before me this 4th day of January, 1897.

FRANCIS H. LUDLOW,
Notary Public, Kings County, New York.

EXHIBIT A.

STATE OF NORTH DAKOTA, }
County of Barnes. }

In District Court, Fifth Judicial District.

MAUDE E. SEMON, Plaintiff, }
vs.
JAMES L. SEMON, Defendant. }

Decree for Plaintiff of Divorce "a Vinculo Matrimonii."

This cause being brought by the above-named plaintiff, Maude E. Semon, to obtain a divorce "*a vinculo matrimonii*" from the above-named defendant, James L. Semon, on the ground of willful desertion and neglect; and it appearing to the court from the pleadings and papers on file in said cause that the summons therein has been duly served on said defendant by an order heretofore made by and from this court for the publication of said summons, and then and thereafter, as an equivalent to such publication as by statute in such

case made and provided, personal service was secured on said defendant in the State of New York; and that the defendant failed to answer, demur, or to make any appearance whatever, as by
25 the summons and the law required in such case, but instead thereof made default; that upon such default and upon the application of the plaintiff the court on the 3rd day of January, 1891, duly referred this cause, by an order to John Anderson, a notary public within and for the county of Barnes and State of North Dakota, of Valley City of said county and State, as referee, to take the evidence in the above-entitled action material to the allegations of said complaint, in the form of written questions and answers, and report the same to this court; and the said referee having taken the testimony by written questions and answers, and reported the same to the court, and in all things obeyed the order of the court; and an application having been duly made to this court, representing that Mrs. Sarah C. McKee, William McKee, Sophia M. Drake and Mrs. C. Baker, all residing in the county of Kings and State of New York, were material witnesses on the part of the plaintiff, in said cause, and that the personal attendance of said witnesses could not be procured at the trial of said action, the court duly appointed J. George Flammer, a notary public in and for the county of New York and State of New York, of said city and State, sole commissioner to take the testimony of said witnesses upon the interrogatories attached to his said commission of appointment, and none others, and to return said testimony when duly signed and certified, together with said commission and the papers thereto annexed, to the clerk of this court at Valley City, North Dakota, and the said commissioner having taken the testimony of the said witnesses as required by said commission, and reported the same to the clerk of this court, and in all things obeyed the order of the court; from which it appears that all the material allegations of the complaint aforesaid are proven by testimony free from all legal exceptions, as to the competency, admissibility and sufficiency thereof; that said matter so alleged and proven in behalf of the plaintiff is sufficient to entitle her to the relief prayed for in her complaint; that the plaintiff was a resident of Barnes county and State of North Dakota at the commencement of this action, and had been
26 for more than ninety days next preceding; that for more than one year immediately and next preceding the commencement of this action the said defendant had wilfully and without cause deserted said plaintiff; and also since and during the time of his said desertion, had wilfully and without cause wholly neglected to provide said plaintiff and her two children born as the issue of the marriage with defendant, with the common necessaries of life, and while plaintiff was a resident of this county and State aforesaid said defendant continuously so deserted and neglected to provide for said plaintiff and her said two children and still continues to do so; that said plaintiff and defendant intermarried on the 12th day of May, 1885, and that the issue of said marriage is Edna Kate Semon, born on the 8th day of June, 1886, and Randolph

Alexander Semon, born on the 6th day of August, 1887, and that the same are now living.

Now, therefore, on motion of Winterer & Winterer, counsel for plaintiff,

It is ordered, adjudged and decreed by the court that the bonds of matrimony heretofore entered into between the said plaintiff, Maude E. Semon, and the said defendant James L. Semon, on the 12th day of May, 1885, be hereby and are dissolved, and the said parties are and each of them is freed and absolutely released from the bonds of matrimony and all the obligations thereof; that the custody, care and education of the said children, the issue of the said marriage, be hereby and is awarded to the plaintiff; of which all persons interested are to take notice and govern themselves accordingly.

Dated at the city of Jamestown, county of Stutsman and State of North Dakota this 26th day of January, 1891.

RODERICK ROSE, *Judge.*

Attest: H. O. STERL, *Clerk,*
By M. G. CUSHING, *Deputy.*

27 STATE OF NORTH DAKOTA, } ss:
County of Barnes, }

Fifth Judicial District Court.

Filed in the office of the clerk of the district court for the county of Barnes, North Dakota, this 29th day of January, 1891.

H. O. STERL,
Clerk of said Court,
By M. G. CUSHING, *Deputy.*

EXHIBIT B.

Summons.

STATE OF NORTH DAKOTA, }
County of Barnes. }

In District Court, Fifth Judicial District.

MAUD E. SEMON, Plaintiff, }
vs. }
JAMES L. SEMON, Defendant. }

The State of North Dakota to the above-named defendant:

You are hereby summoned and required to answer the complaint of the plaintiff in the above-entitled action, which was filed in the office of the clerk of the district court of the fifth judicial district, in and for the county of Barnes and State of North Dakota, on the 25th day of September, 1890, a copy of which is herewith served on you, and to serve a copy of your answer to the said complaint on the subscribers at their office in the city of Valley City, in the

county and State aforesaid, within thirty days after the service of this summons on you, exclusive of the day of such service; and if you fail to answer to the complaint above mentioned as hereby required within the time aforesaid, the plaintiff in this action
28 will apply to the court for the relief demanded in the complaint.

WINTERER & WINTERER,
Attorneys for Plaintiff, Valley City, North Dakota.

Dated at Valley City, North Dakota, this 23 day of Sept., 1890.

STATE OF NORTH DAKOTA, } ss:
County of Barnes, }

Filed in the office of the clerk of the district court for the county of Barnes, North Dakota, this 25th day of Sept., 1890.

A. J. HENRY,
By M. G. CUSHING, *Deputy.*

"EXHIBIT C."

STATE OF NORTH DAKOTA, } ss:
County of Barnes, }

In District Court, Fifth Judicial District.

MAUDE E. SEMON, Plaintiff, }
vs.
JAMES L. SEMON, Defendant. }

Sheriff's Return.

I hereby certify that the within summons came to my hands on the 25th day of Sept., 1890, and that I made diligent search to find the within-named defendant in the said county of Barnes, but failed to find him, and I am informed and believe that the said de-
29 fendant is now a resident of New York, of the State of New York.

JOHN SIMONS,
Sheriff of Barnes County, N. D.,
By SAMUEL BURT,
Deputy Sheriff.

Dated at Valley City, North Dakota, this 25th day of September, 1890.

Sheriff's fees, $—.

STATE OF NORTH DAKOTA, } ss:
County of Barnes, }

Filed in the office of the clerk of the district court for the county of Barnes, North Dakota, this 24th day of Jan'y, 1891.

H. O. STERL,
Clerk of said Court,
By M. G. CUSHING, *Deputy.*

EXHIBIT D.

STATE OF NORTH DAKOTA, }
County of Barnes. }

In District Court, Fifth Judicial District.

MAUDE E. SEMON, Plaintiff, }
vs.
JAMES L. SEMON, Defendant. }

Complaint.

The plaintiff in the above-entitled action complains of the defendant and alleges:

I.

That the plaintiff and the above-named defendant James
30 L. Semon, intermarried in the city of New York and State of New York according to the laws of said State, to wit on the 12th day of May, 1885, and ever since have been and now are husband and wife.

II.

That the plaintiff is now and has been a resident of the State of North Dakota, for the period of over ninety days immediately preceding the commencement of this action, to wit: since the seventh day of June, 1890.

III.

That the issue of the said marriage of the plaintiff and defendant is two children, to wit: Edna Kate Semon, born on the 8th day of June, 1886, and Randolph Alexander Semon, born on the 6th day of August, 1887, and that the said children are now living.

IV.

That the said defendant, disregarding the solemnity of the marriage vow, wilfully and without cause deserted and abandoned said plaintiff more than one year previous to the commencement of this action, to wit: on the tenth day of September, 1889, and ever since has and still continues so to wilfully and without cause desert and abandon said plaintiff, and to live separate and apart from her, without any sufficient cause or reason, and against her will and without her consent.

And for a second and further cause of action the plaintiff alleges:

I.

That the said defendant has ever since his marriage with plaintiff, to wit: since the 12th day of May, 1885, and as well before his desertion of plaintiff on the time aforesaid, to wit: on the 10th day of September, 1889, as thereafter, wilfully and without cause
31 neglected to provide for the plaintiff the common necessaries of life, having the ability so to do, and still continues so to

wilfully and without cause neglect to provide said plaintiff with the common necessaries of life, and has compelled the said plaintiff to live on the proceeds of her own labor and on the charity of friends.

And for a further and third cause of action the plaintiff alleges:

I.

That the said defendant, since the time of his intermarriage with said plaintiff and during the time of his cohabitation with her, was, and as she believes, is still strongly addicted to the use of intoxicating liquor, the peace and happiness of said plaintiff having often been disturbed and destroyed by the intoxication of said defendant.

II.

That in accordance with the provisions of sections 2564 and 2583, of the Compiled Laws of 1887 of the Territory of Dakota, now State of North Dakota, said defendant is not a fit custodian of the issue of said marriage, nor competent to have the same in his charge or under his care.

Wherefore the plaintiff prays the court for judgment:

First. That the bonds of matrimony between herself and the defendant be dissolved.

Second. That the custody, care and education of the said children, resulting from the said marriage, to wit, Edna Kate Semon and Randolph Alexander Semon, be awarded to the plaintiff.

WINTERER & WINTERER,
Attorneys for Plaintiff.

32 STATE OF NORTH DAKOTA, } ss:
County of Barnes, }

Maude E. Semon, being first duly sworn, on her oath deposes and says:

That she is the plaintiff in the above-entitled action; that she has read the above and foregoing complaint and knows the contents thereof; and that the same is true of her own knowledge, except as to those matters stated therein on information and belief, and as to those matters she believes it to be true.

MAUDE E. SEMON.

Subscribed and sworn to before me this 23rd day of Sept. in the year of our Lord eighteen hundred and ninety.

[SEAL.] GEORGE K. ANDRUS,
Notary Public, Barnes County, State of North Dakota.

STATE OF NORTH DAKOTA, } ss:
County of Barnes, }

Filed in the office of the clerk of the district court for the county of Barnes, North Dakota, this 25th day of Sept., 1890.

A. J. HENRY,
By M. G. CUSHING, *Deputy.*

33 EXHIBIT E.

STATE OF NORTH DAKOTA, } ss:
County of Barnes, }

In District Court, Fifth Judicial District.

MAUDE E. SEMON, Plaintiff, }
vs.
JAMES L. SEMON, Defendant. }

COUNTY OF BARNES, ss:

Edward Winterer, being duly sworn, on oath, says, he is one of the attorneys for the plaintiff in this action; that the said defendant, James L. Semon, cannot after due diligence be found in this State; and that a summons was duly issued against said defendant and placed in the hands of the sheriff of said county for service, but was returned by said sheriff with his endorsement thereon that said defendant could not be found, which summons so endorsed is hereto annexed. That said affiant made diligent and thorough inquiries of those persons who are in the best position to know the residence and domicile of said defendant, to ascertain such residence and domicile, and was informed that defendant is not a resident of this State but resides and is now domiciled in the city of New York in the State of New York, and that said inquiries were made personally and by letter.

That a cause of action exists against the said defendant in favor of said plaintiff, as will appear by the complaint of said plaintiff, a copy of which is hereto annexed.

That the affiant is informed and believes that the said defendant, James L. Semon, resides at New York, in the State of New York, and that he is not a resident of this State, but resides in the city and State aforesaid, viz., city of New York and State of New York.

That the subject of this action is for a divorce, as in sub.
34 5 of section 4900 of the Compiled Laws of the Territory of Dakota, now State of North Dakota, for 1887.

EDWARD WINTERER.

Subscribed and sworn to before me this 23rd day of September, A. D. 1890.

GEORGE K. ANDRUS,
[SEAL.] *Notary Public, Barnes County, N. D.*

STATE OF NORTH DAKOTA, } ss:
County of Barnes, }

Fifth Judicial District Court.

Filed in the office of the clerk of the district court for the county of Barnes, North Dakota, this — day of ——, 18—.

——— ———,
Clerk of said Court.

EXHIBIT F.

STATE OF NORTH DAKOTA, *County of Barnes,* } ss:

In District Court, Fifth Judicial District.

MAUDE E. SEMON, Plaintiff,
vs.
JAMES L. SEMON, Defendant.

It satisfactorily appearing to the Hon. Roderick Rose judge of this court by the annexed affidavit of Edward Winterer that the defendant James L. Semon cannot, after due diligence, be found within this State and in a like manner appearing that a cause of action exists against the said defendant in favor of said plaintiff, Maude E. Semon, for a divorce from the bonds of matrimony between herself and said defendant as set forth in her complaint, a copy of which is hereto annexed, and that the subject of said action is included under and governed by subdivision five (5) of sec. 4900 of the Compiled Laws of the Territory of Dakota, now State of North Dakota, for 1887.

And it further appearing that the place of residence of the said defendant James L. Semon is at New York in the State of New York.

On motion of Winterer & Winterer attorneys for the said plaintiff, ordered that service be made upon said defendant by the publication of a summons in the form of the copy of same hereto annexed, in the Farmers' Alliance a newspaper printed and published in Valley City, Barnes county, N. Dak. the same being most likely to give notice to said defendant, once a week for at least six successive weeks.

And it is further ordered and directed that a copy of the summons and complaint be forthwith deposited in the post-office, directed to the said defendant, the person to be served, at New York, in the State of New York, his place of residence, and postage paid.

Dated September 30th, 1890.

RODERICK ROSE, *Judge.*

Attest: H. O. STERL, *Clerk.*
G. M. CUSHING, *Deputy.*

[Seal of District Court, Barnes County, State of North Dakota.]

36 EXHIBIT G.

STATE OF NORTH DAKOTA, }
County of Barnes. }

In District Court, Fifth Judicial District.

MAUDE E. SEMON, Plaintiff, }
vs. }
JAMES L. SEMON, Defendant. }

CITY AND COUNTY OF NEW YORK, *ss:*

Francis W. Judge, Jr., being duly sworn, says that he is over the age of twenty-one years, and is a special deputy sheriff within and for the county of New York. That on the 15th day of October, 1890, at No. 803 Ninth avenue in the city of New York, he served the annexed summons together with a copy of the annexed complaint upon the defendant James L. Semon therein named by delivering a copy of said summons and the said copy complaint to the said James L. Semon personally and leaving the same with him, and at the same time showing him the original summons and complaint herein.

Deponent further says that he knew the said James L. Semon served as aforesaid to be the same person mentioned and described in the said summons and complaint as the defendant in this action.

FRANCIS W. JUDGE, JR.

Sworn to before me this 15th day of October, 1890.

JAMES FORREST,
Notary Public, N. Y. Co.

STATE OF NORTH DAKOTA, }
County of Barnes, } *ss:*

Fifth Judicial District Court.

Filed in the office of the clerk of the district court for the county of Barnes, North Dakota, this 24th day of January, 1891.

H. O. STERL,
Clerk of said Court,
By M. G. CUSHING, *Deputy.*

37 EXHIBIT H.

STATE OF NORTH DAKOTA, }
County of Barnes. }

In District Court, Fifth Judicial District.

MAUDE E. SEMON, Plaintiff, }
vs.
JAMES L. SEMON, Defendant. }

Affidavit of No Answer.

Edward Winterer being first duly sworn according to law on his oath deposes and says that he is one of the attorneys for the plaintiff in the above-entitled action; that said defendant, James L. Semon, could not after due diligence be found in this State; that a summons was duly issued against said defendant and placed in the hands of the sheriff of said county of Barnes for service but was returned by said sheriff of said county of Barnes with his endorsement thereon that said defendant could not be found in said county, and it appearing that said defendant was known to be a resident of the State of New York, an order was issued by the court of the fifth judicial district of this State on the 30th day of September, 1890, that said defendant be served by the publication of the summons as provided by law and that after such order was issued and in lieu of and as an equivalent to such publication as by statute in this State made and provided, due personal service was made on said defendant on the 15th day of October, 1890, in the city of New York, State of New York, and that now more than thirty days have elapsed since said personal service was made and obtained on said defendant as aforesaid, and that no answer or demurrer to the complaint of the plaintiff in said action has been received by the plaintiff or her attorneys in said cause, and that said defendant
38 has not made, served or filed an appearance in any manner therein.

EDWARD WINTERER.

Subscribed and sworn to before me this 31st day of December, 1890.

JOHN ANDERSON,
[SEAL.] *Notary Public, Barnes Co., N. D.*

STATE OF NORTH DAKOTA, } *ss:*
County of Barnes, }

Fifth Judicial District Court.

Filed in the office of the clerk of the district court for the county of Barnes, North Dakota, this 24th day of January, 1891.

H. O. STERL,
By M. G. CUSHING, *Deputy.*

EXHIBIT I.

STATE OF NORTH DAKOTA, } ss:
County of Barnes, }

In District Court, Fifth Judicial District.

MAUDE E. SEMON, Plaintiff, }
vs.
JAMES L. SEMON, Defendant. }

Affidavit for Commission to Take Testimony.

Edward Winterer being first duly sworn, on his oath deposes and says that he is one of the attorneys for the plaintiff in the above-entitled action, which has been brought for a divorce from the bonds of matrimony. That the summons and a copy of the complaint in this action have been duly served on the defendant
39 as provided by statute in this State on the 15th day of October, 1890, in the city of New York, and State of New York, and that now over thirty days have elapsed since such personal service was made, and said defendant has failed to serve any answer, or demurrer, or copy of either to the complaint in this action on said plaintiff or her attorneys in said cause or to make any appearance whatever in said action; that the said plaintiff, Maude E. Semon, has fully and fairly stated the case in this cause to said deponent and fully and fairly disclosed to him the facts which she expects to prove and that Mrs. Sarah C. McKee, William McKee, Sophia M. Drake, and Mrs. C. Baker are all material and necessary witnesses for the said plaintiff on the trial of this action and without the aid and benefit of the testimony of the said witnesses the plaintiff cannot safely proceed to trial; that the said witnesses reside in the city of Brooklyn, Kings county and State of New York, that the same are out of this State and will continue to be absent therefrom when their testimony is required. And deponent further states that from his knowledge of the facts in said case he verily believes that the said plaintiff has a good and meritorious cause of action.

EDWARD WINTERER.

Subscribed and sworn to this 31st day of Dec., 1890.

JOHN ANDERSON,
[SEAL.] *Notary Public, Barnes Co., N. D.*

STATE OF NORTH DAKOTA, } ss:
County of Barnes, }

Fifth Judicial District Court.

Filed in the office of the clerk of the district court for the county of Barnes, North Dakota, this 24th day of January, 1891.

H. O. STERL,
Clerk of said Court.
M. G. CUSHING, *Deputy.*

40 EXHIBIT J.

STATE OF NORTH DAKOTA, }
County of Barnes. }

In District Court, Fifth Judicial District.

MAUDE E. SEMON, Plaintiff, }
vs. }
JAMES L. SEMON, Defendant. }

Order of Reference.

Upon examination of the complaint of the plaintiff duly verified and filed in the above-entitled action, and it appearing therefrom that a cause of action exists against the defendant therein named and in favor of said plaintiff, and that the same is within the jurisdiction of this court to determine, and

It further appearing from the summons on file and presented to me, with the official endorsement of the sheriff of said Barnes county duly made thereon, that after diligent search he could not find said defendant in said county and from the affidavit of Edward Winterer, one of the attorneys for said plaintiff, that said defendant is not a resident of this State, and that an order was issued by this court on the 30th day of September, 1890, that due service be made on said defendant by publication of the summons as provided by law, and that in lieu of and as an equivalent to such publication as provided by section 4900, sub. 5, of the Compiled Laws of this State, personal service was duly made on the said defendant in the city of New York, State of New York, on the 15th day of October, 1890, as appears by the affidavit of Francis W. Judge, Jr., hereto attached, and

It further appearing by the affidavit of Edward Winterer, one of the attorneys for said plaintiff, that no answer or demurrer to said complaint has been served upon or received by plaintiff or her attorneys in this action, and that said defendant has not made, served or filed an appearance in any manner therein, and

It further appearing that this action is brought for the pur-
41 pose of obtaining a divorce *a vinculo matrimonii*, and that the plaintiff having applied to this court for the relief demanded in her complaint and that the nature of the action is such that the court has discretionary power to refer the same:

Now, therefore, on motion of Winterer & Winterer, attorneys for plaintiff, no person appearing to oppose the same,

It is ordered that the said cause be and the same is hereby referred to John Anderson, a notary public within and for said county and State, of Valley City, Barnes county, North Dakota, and he is hereby expressly appointed as referee and authorized with full and plenary powers to take the evidence in the above-entitled action material to the allegations of said complaint, in the form of written questions and answers, and to do all such other acts as are necessary

to fully complete and carry into effect this order, and that said referee is required to report all the evidence taken by him in relation thereto and to report the same to this court within twenty days after the evidence is closed.

By the court.

RODERICK ROSE, *Judge.*

Done at Valley City, N. Dakota, this 3rd day of January, 1891.
Attest: H. O. STERL, *Clerk,*
By M. G. CUSHING, *Deputy.*

[Seal of said Court.]

STATE OF N. D., } ss:
Co. Barnes, }

Fifth Judicial District Court.

Filed in the offices of the clerk of the district court for the county of Barnes, North Dakota, this 24th day of January, 1891.

H. O. STERL,
Clerk of said Court,
By M. G. CUSHING, *Deputy.*

42 STATE OF NORTH DAKOTA, }
County of Barnes. }

In District Court, Fifth Judicial District.

MAUDE E. SEMON, Plaintiff, }
vs. }
JAMES L. SEMON, Defendant. }

I, H. O. Sterl, clerk of the district court of the fifth judicial district in and for the county of Barnes, State of North Dakota, do hereby certify that I have compared the annexed instrument, to wit, Exhibit A pages 1 and 2 Exhibit- B, C and D pages 1 and 2, Exhibit- E, F, G, H, I, and J, being respectively the decree for the plaintiff of divorce "*a vinculo matrimonii*" with filing mark of the clerk thereon, summons with filing mark thereon, sheriff's return with filing mark thereon, complaint, and verification of complaint, with filing mark thereon, affidavit of Edward Winterer, one of the attorneys for the plaintiff, signed and sworn to on the 23rd day of September, A. D., 1890, before George K. Andrus, notary public, with filing mark thereon, order for the publication of the summons signed by Roderick Rose, judge, on the 30th day of September, 1890, proof of service of the summons and complaint, on the defendant, James L. Semon, which proof was executed on the 15th day of October, 1890, before James Forrest, notary public, New York, with filing mark thereon, affidavit for commission to take testimony, with filing mark thereon, and order of reference with filing mark thereon, with the original files and records, constituting the judgment-roll in the above-entitled action, which judgment-roll is now on file and of record in my office and that said papers, and

each of them are true and correct copies of said originals and the whole thereof.

I furthermore certify that said papers are true and correct copies of the entire judgment-roll on file in my office in said action, except the testimony of the witnesses therein, and the report of the referee appointed to take testimony, and the oath of said referee.

43 In testimony whereof, I have hereunto subscribed my name and affixed the seal of this court thereto at my office in the court-house, in the city of Valley City, in the county of Barnes, State of North Dakota, that being the office of the clerk of the said district court in and for the said county of Barnes and State of North Dakota.

H. O. STERL,

[SEAL OF SAID COURT.] *Clerk of the District Court in and for the County of Barnes and State of North Dakota.*

EXHIBIT A 1.

STATE OF NORTH DAKOTA, } ss:
County of Stutsman, }

I, Roderick Rose, judge of the district court within and for the fifth judicial district of the State of North Dakota, including the counties of Barnes and Stutsman, in said judicial district, do hereby certify that I have examined the annexed certificate and attestation of H. O. Sterl, clerk of the said district court within and for the said county of Barnes; that the said H. O. Sterl is the clerk of said court within and for the said county of Barnes, and the proper person to make said certificate and attestation; that I am well acquainted with and know *that* the handwriting of the said H. O. Sterl and the signature attached to the said certificate purporting to be the signature of the said H. O. Sterl, and know that it is his genuine signature, and I further certify that said certificate and attestation is made and executed in due form and in compliance with law.

Dated this 10th day of December, 1896.

RODERICK ROSE,

Judge of the District Court of the Fifth Judicial District of the State of North Dakota.

44 STATE OF NORTH DAKOTA, } ss:
County of Barnes, }

In District Court, Fifth Judicial District.

I, H. O. Sterl, clerk of the district court within and for the said county of Barnes, in the fifth judicial district of said State of North Dakota, do hereby certify that I have examined the certificate hereto attached purporting to be made by Roderick Rose, judge of the fifth judicial district of the State of North Dakota, and presiding judge of the district court within and for the county of Barnes in the State of North Dakota; that the said Roderick Rose is the judge of the fifth judicial district and is the presiding judge of the

district court within and for the said county of Barnes and is the duly elected, qualified and acting judge of the said judicial district and of said district court within and for said Barnes county; that I am well acquainted with the signature of the said Roderick Rose and know that the signature attached to said certificate purporting to be the signature of the said Roderick Rose is in his handwriting and is his genuine signature.

Witness my hand and seal this 10th day of December, 1896.

H. O. STERL,
Clerk of Court.

[SEAL OF SAID COURT.]

I, C. M. Dahl, by William O. De Puy, deputy secretary of state in and for the State of North Dakota, do hereby certify that the district court of the fifth judicial district, including the county of Barnes, in the State of North Dakota, is organized and existing under, by virtue of and pursuant to the constitution and laws of the State of North Dakota; that said court is a court of general jurisdiction; that the present judge of said court is the Hon. Roderick Rose, the identical person who has signed the annexed
45 certificate marked Exhibit "A 1." That I am acquainted with the signature of the said judge and know that the signature attached to said certificate markeed Exhibit "A 1," purporting to be his signature is in his handwriting and is genuine.

Dated December 17th, A. D. 1896.

C. M. DAHL,
Secretary of State,
By WILLIAM O. DE PUY,
Deputy Sec. of State.

[SEAL.]

Kings County Surrogate's Court.

In the Matter of the Application for Letters of Administration of the Goods, Chattels, and Credits which were of EDWARD C. KIMBALL, Deceased, and for the Revocation of the Letters Issued to HARRIET A. KIMBALL and JOHN S. JAMES on the 10th Day of November, 1896.

Reply of Maude E. Kimball.

Your petitioner, Maude E. Kimball, replying to the answer of Harriet A. Kimball, John S. James and Harriet I. James in the above matter, verified January 4th, 1897, respectfully shows:

First. Your petitioner denies that she and Edward C. Kimball were ever separated and were not living together at the time of his death, except that said Edward C. Kimball left the city of Brooklyn and went to Easton, Pennsylvania, to engage in business, and your petitioner was compelled to return to her mother's home and
46 live with her owing to the inability of said Edward C. Kimball to support your petitioner, as alleged in the petition herein.

Second. Your petitioner denies that James L. Semon mentioned in said answer did not appear in the action for divorce referred to in

said answer, and that said Semon did not answer the complaint therein.

Third. Your petitioner further denies that the district court, fifth judicial district of the State of North Dakota, county of Barnes, did not acquire jurisdiction of said James L. Semon in said action, and that the decree of divorce in said action was and is absolutely null and void in the State of New York.

Fourth. Your petitioner further denies that, at the time of her marriage to said Edward C. Kimball, she was the wife of said James L. Semon according to the laws of the State of New York; and she also denies that she could not lawfully enter into a marriage with said Edward C. Kimball; and she denies that the marriage between them was absolutely null and void and of no effect.

Fifth. Your petitioner further denies that, on the death of said Edward C. Kimball, all the property left by him in the State of New York passed, under the laws of that State, to Harriet A. Kimball, his mother, and the said Harriet I. James, his sister; and also denies that said Harriet A. Kimball was entitled to apply for and receive letters of administration; and also denies that this petitioner has no interest in the real or personal estate left by said Edward C. Kimball, as his widow or otherwise, and has no right to letters of administration upon his estate as alleged in said answer.

Sixth. Your petitioner further denies that the paper annexed to said answer is a copy of the judgment-roll in said action for divorce.

47 Seventh. And for further reply your petitioner alleges that the papers hereto annexed and marked, respectively, "Exhibit A" and "Exhibit B" are exemplified copies of parts of the judgment-roll in said action for divorce, and that the papers annexed to the said answer, and referred to in the next preceding paragraph hereof, together with said "Exhibit A" and said "Exhibit B," comprise the complete judgment-roll in said action for divorce. That said Harriet A. Kimball, John S. James and Harriet I. James well knew prior to verifying their said answer, that said alleged judgment-roll set forth in their said answer was incomplete, in that it omitted the parts hereto annexed and marked respectively "Exhibit A" and "Exhibit B," as aforesaid.

Eighth. Your petitioner further alleges that her former husband, James L. Semon, did appear and answer in said action for divorce, and did submit himself to the jurisdiction of the court therein; but by inadvertence and mistake said appearance and answer were not recited in the decree of divorce in said action, dated the 26th day of January, 1891; that thereafter, to wit, on the 16th day of December, 1896, upon the petition of said James L. Semon, said decree was duly amended in the form and manner shown by said papers hereto annexed and marked respectively "Exhibit A" and "Exhibit B," as aforesaid.

Ninth. Your petitioner further alleges that on more than one occasion prior to her said marriage with Edward C. Kimball she delivered to him, at his request, a copy of the decree of divorce aforesaid, dated the 26th day of January, 1891, and filed January 29th,

1891, duly certified by the clerk of the said district court and under the seal of said court, and that said Edward C. Kimball read the same and retained it in his possession several days; and that he, said Edward C. Kimball, well knew that before, and at the time of, and after our said marriage to each other, the said James L.
48 Semon was living; and upon information and belief, that prior to your petitioner's said marriage to said Edward C. Kimball, said Harriet A. Kimball, John S. James and Harriet I. James also well knew of said divorce proceedings and saw said certified copy of said decree of divorce, and knew the contents thereof, and also well knew that said James L. Semon was alive during the whole of the married life of your petitioner and said Edward C. Kimball.

Tenth. Your petitioner further alleges that the proceedings in said action for divorce were regular and sufficient, and that the said decree of divorce was duly given and made, and was and is a valid, binding and conclusive adjudication and judgment under the laws of the State of North Dakota, in the State of North Dakota and in the State of New York, and in every other State in the United States. And your petitioner begs leave to present on the hearing of the above-entitled matter such portions of the laws of the State of North Dakota as she may be advised pertinent to the matters herein referred to.

Wherefore your petitioner prays for the relief demanded in her petition herein, verified on the 17th day of December, 1896.

Dated this 19th day of January, 1897.

MAUDE E. KIMBALL, *Petitioner.*

WALDEGRAVE HARLOCK,
Attorney for Petitioner,
20 *Nassau Street, New York City.*

STATE OF NEW YORK, }
County of Kings, City of Brooklyn, } *ss:*

Maude E. Kimball, the above-named petitioner, being duly
49 sworn, doth depose and say that she has read the foregoing reply subscribed by her, and that the same is true of her own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters she believes it to be true.

MAUDE E. KIMBALL.

Subscribed and sworn to before me this 12th day of January, 1897.

THOS. W. HARRIS,
Notary Public, Kings County.

EXHIBIT A.

STATE OF NORTH DAKOTA, } ss:
County of Barnes, }

In District Court, Fifth Judicial District.

I, H. O. Sterl, clerk of the district court in and for said county, do hereby certify that I have compared the papers in writing, to which this certificate is attached, with the original petition of James L. Semon herein verified December 1st, 1896, and the letter, Exhibit "A," attached, and with the "order to show cause why leave should not be granted to amend decree," dated December 8th, 1896, and with the affidavit of Herman Winterer sworn to December 11th, 1896, and with the order of the court herein "granting leave to amend decree *nunc pro tunc*," dated December 16th, 1896, as the same appear of record and on file in my said office, at the court-house in said county, and that the same are true and correct copies of said originals, and the whole thereof.

Seal of said Court.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at Valley City, said county and State, this 16th day of December, A. D. 1896.

H. O. STERL, *Clerk.*

50 STATE OF NORTH DAKOTA, } ss:
County of Barnes, }

I, Roderick Rose, judge of the fifth judicial district of the State of North Dakota, do hereby certify that H. O. Sterl whose name is subscribed to the foregoing certificate of attestation, now is, and was, at the time of signing and sealing the same, clerk of the district court of Barnes county aforesaid (which county is in said fifth judicial district) and keeper of the records and seal thereof, duly elected and qualified to office; that full faith and credit are and of right ought to be given to all his official acts as such in all courts of record and elsewhere; and that his said attestation is in due form of law, and by the proper officer.

Given under my hand and seal this 16th day of December, A. D. 1896.

RODERICK ROSE, [SEAL.]
District Judge.

STATE OF NORTH DAKOTA, } ss:
County of Barnes, }

I, H. O. Sterl, clerk of the district court, in and for said county, in the State aforesaid, do hereby certify that Roderick Rose, whose genuine signature is appended to the foregoing certificate, was, at the time of signing the same, judge of the district court of the fifth judicial district of the State of North Dakota (of which judicial district the said Barnes county forms a part), duly commissioned and qualified; that full faith and credit are and of right ought to be given to all his official acts as such, in all courts of record and elsewhere.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at my office in Valley City, in said county and State this 16th day of December, A. D. 1896.

Seal of said Court.

H. O. STERL, *Clerk.*

51 STATE OF NORTH DAKOTA, } ss:
County of Barnes, }

In District Court, Fifth Judicial District.

At a regular term of said district court held at the county court-house, in Valley City, N. D., on the — day of December, A. D. 1896.

MAUDE E. SEMON, Plaintiff, }
vs.
JAMES L. SEMON, Defendant. }

Order Amending Decree Nunc pro Tunc.

On reading and filing the petition of James L. Semon, verified the 1st day of December, 1896, and the affidavit of Herman Winterer, Esq., verified the 11th day of December, 1896, and proof of due notice of this motion to Winterer & Winterer, attorneys of record for plaintiff, and after hearing Frank J. Young, Esq., in support of said motion, and no one appearing in opposition thereto, and on motion of Young & Burke, attorneys for defendant,

It is ordered that said motion be, and the same is, hereby granted, and that the copy of defendant's letter dated October 23rd, 1890, directed to Herman Winterer, be filed herein as of the date of its receipt by said Winterer, and that the decree made herein dated January 26th, 1891, be amended *nunc pro tunc* as of the 26th day of January, 1891, by striking out therefrom the recitals setting forth "that the defendant failed to answer, demur or make any appearance whatever, as by the summons and the law required in such case, but instead thereof made default; that upon such default," and by inserting in lieu thereof the following words: "the
52 defendant having appeared herein and answered and submitted himself to the jurisdiction of the court."

Dated this 16th day of December, A. D. 1896.

By the court:

RODERICK ROSE, *Judge.*

Attest: H. O. STERL, *Clerk.*

[Seal of said Court.]

(Endorsed.)

STATE OF NORTH DAKOTA, } ss:
County of Barnes, }

Fifth Judicial District Court.

Filed in the office of the clerk of the district court for the county of Barnes, North Dakota, this 16th day of Dec., 1896.

H. O. STERL,
Clerk of said Court.

STATE OF NORTH DAKOTA, } ss
County of Barnes, }

In District Court, Fifth Judicial District.

MAUDE E. SEMON, Plaintiff, }
vs.
JAMES L. SEMON, Defendant. }

Affidavit.

STATE OF NORTH DAKOTA, } ss:
County of Barnes, }

Herman Winterer, being first duly sworn, deposes and says that he is an attorney-at-law and has been in actual practice as such in the county of Barnes and State of North Dakota ever since the month of April, 1883; that subsequent to that time and prior
53 to October, 1890, Mr. Edward Winterer was associated with him, and the said affiant has since been practicing law at said place under the firm name of Winterer & Winterer, consisting of said parties above named; that prior to October 23rd, 1890, said firm brought an action for the above-named plaintiff and against the above-named defendant, for the purpose of procuring a divorce for said plaintiff; that on the 8th day of December, 1896, said firm were served with a copy of the petition and an order to show cause, made by the judge of the above-entitled court, on the 8th day of December, 1896, whereby said defendant petitioned the said court for leave to amend *nunc pro tunc* the decree of divorce granted to said plaintiff by the said court on the 26th day of January, 1891; that affiant has read said petition and also Exhibit "A" made a part thereof.

That Messrs. Young & Burke, attorneys for said defendant, upon said petition, have made request upon the affiant to procure the original of the letter marked Exhibit "A" of said petition, but affiant is unable to do so, for the reason that after he has made diligent search, he is unable to find the same; that the same is either lost or destroyed; whereupon said Young & Burke, as attorneys for said defendant, request affiant to make affidavit, stating whether or not he, affiant, ever received such a letter as the one above referred to as Exhibit "A."

That affiant pursuant to such request, and as a matter of fact, hereby states that the said original letter cannot be found, and alleges further that he did receive the original letter of which the said Exhibit "A" is a copy, and that the said copy marked Ex-ibit "A" as aforesaid is made a part of said petition, and is a true and correct copy of the original received by this affiant on or about Oct. 28th, 1890; that the said original letter was never filed with the records in the above-entitled cause, the reason for not filing the same, to the best of affiant's belief and remembrance, being this, to wit: Because the said letter was not in the form of a pleading
54 under the requirements of the statute of the State of North Dakota. Further affiant sayeth not.

HERMAN WINTERER.

Subscribed and sworn to before me this 11th day of December, 1896.

[SEAL.] LOUISE WINTERER,
Notary Public, State of North Dakota.

(Endorsed.)

STATE OF NORTH DAKOTA, } ss:
County of Barnes, }

Fifth Judicial District Court.

Filed in the office of the clerk of the district court for the county of Barnes, North Dakota, this 16th day of Dec., 1896.

H. O. STERL,
Clerk of said Court.

STATE OF NORTH DAKOTA, }
County of Barnes. }

In District Court, Fifth Judicial District.

MAUDE E. SEMON, Plaintiff, }
vs. }
JAMES L. SEMON, Defendant. }

NEW YORK, *December 1st*, 1896.

To Young & Burke, attorneys-at-law, Valley City, N. D.

I hereby authorize and request you to appear as my attorneys in the above-entitled matter for the purpose of having the decree herein amended according to the prayer of my petition sworn to December 1st, 1896; and to receive and acknowledge service of all papers herein on my behalf, and to do any act or thing, as
55 my attorney-, that may be necessary and proper in this case and in my interest.

JAMES L. SEMON.

Subscribed and acknowledged before me this 1st day of December, 1896.

[L. S.] F. W. LONGFELLOW,
Notary Public, New York County, N. Y.

STATE OF NEW YORK, } ss:
City and County of New York, }

On this first day of December, 1896, before me, F. W. Longfellow, a notary public for the county of New York, personally appeared James L. Semon known to me to be the person who is described in and who executed the above instrument, and he acknowledged to me that he executed the same.

F. W. LONGFELLOW, ss.,
[SEAL.] *Notary Public, N. Y. Co.*

(Endorsed.)

STATE OF NORTH DAKOTA, } ss:
County of Barnes, }

Fifth Judicial District Court.

Filed in the office of the clerk of the district court for the county of Barnes, North Dakota, this 16 day of Dec., 1896.

H. O. STERL,
Clerk of said Court.

56 STATE OF NORTH DAKOTA, } ss:
County of Barnes, }

In District Court, Fifth Judicial District.

At a regular term of said district court held at the county court-house in Valley City, N. D., on the 8th day of December, 1896.

MAUDE E. SEMON, Plaintiff, }
vs. }
JAMES L. SEMON, Defendant. }

Order to Show Cause Why Decree Should Not Be Amended.

On the annexed petition of James L. Semon, verified the 1st day of December, 1896, and on motion of Young & Burke, attorneys for defendant, let the plaintiff or her attorneys show cause before the court at the court-house at Valley City, N. D., on the 11th day of December, 1896, at 2 o'clock, p. m., why the alleged answer should not be filed *nunc pro tunc*, and why the decree filed herein should not be amended *nunc pro tunc* so as to show that defendant appeared in said action, as prayed for. Let a copy of this order and of the defendant's petition annexed hereto be served on plaintiff's attorneys of record forthwith.

Dated, December 8th, 1896.

RODERICK ROSE, *Judge.*

Due and personal service by receipt of a copy of above order and of a copy of the petition of defendant herein is hereby admitted this 8th day of December, 1896.

WINTERER & WINTERER.

(Endorsed.)

STATE OF NORTH DAKOTA, } ss:
County of Barnes, }

Fifth Judicial District Court.

Filed in the office of the clerk of the district court for the county of Barnes, North Dakota, this 16 day of Dec., 1896.

H. O. STERL,
Clerk of said Court.

57 STATE OF NORTH DAKOTA, }
County of Barnes. }

In District Court, Fifth Judicial District.

MAUDE E. SEMON, Plaintiff, }
against }
JAMES L. SEMON, Defendant. }

To the Honorable Roderick Rose, judge:

The petition of James L. Semon respectfully shows:

That your petitioner is the defendant above named.

That this cause or action was brought by Maude E. Semon, the above-named plaintiff, to obtain a divorce "*a vinculo matrimonii*" from your petitioner, and that a decree was made herein bearing date the 26th day of January, 1891, and filed in the office of the clerk of the district court for the county of Barnes, North Dakota, on the 29th day of January, 1891. That said decree adjudged "that the bonds of matrimony heretofore entered into between the said plaintiff, Maude E. Semon, and the said defendant, James L. Semon, on the 12th day of May, 1885, be hereby and are dissolved, and the said parties are and each of them is freed and absolutely released from the bonds of matrimony and all the obligations thereof."

That said decree recites, among other things, "that the defendant (meaning your petitioner) failed to answer, demur, or to make any appearance whatever, as by the summons and the law required in such case, but instead thereof made default."

That the summons and complaint in said cause or action were duly served personally upon your petitioner in the city, county and State of New York, on the 15th day of October, 1890; that said summons required your petitioner to answer the complaint in this action and to serve a copy of his answer upon Winterer & Winterer, attorneys for the plaintiff, within thirty days after the service of said summons upon your petitioner.

That your petitioner, desiring to appear in said action and to answer said complaint as required by said summons, did on the 23rd day of October, 1890, at the city of New York aforesaid, where
58 your petitioner then resided, prepare, make and sign his answer to the said complaint, and did subscribe and swear to the same on the 23rd day of October, 1890, before James T. Clark, a notary public in and for the city and county of New York, duly commissioned by law to take oaths and acknowledgments in the said city and county; and on the said 23rd day of October, 1890, your petitioner served by mail his said answer upon Winterer & Winterer, attorneys for plaintiff, by personally depositing in the post-office in the said city of New York his said answer, enclosed in a sealed envelope, with the postage prepaid, addressed to Winterer & Winterer, attorneys for the plaintiff, at Valley City, North Dakota. That a copy of said answer is hereto annexed marked "A."

That your petitioner prepared and sent said answer without the aid or advice and without consultation with any counselor or attorney at law, in order to avoid the expense thereof; and with the

intention to have the said answer presented to this court so as to inform the court of your petitioner's position and defense in this action, and to submit himself to the jurisdiction of the court herein, and to have his rights adjudicated by this court without incurring any expense in the matter. That your petitioner believed that said answer so subscribed and sworn to by him and sent to plaintiff's attorneys would be filed in court as part of the proceedings herein; but your petitioner has learned within the last few days, for the first time, that the same was not filed, and your petitioner has never been aware until now of the recitals of his default in the decree as aforesaid, and has never been served with a copy of said decree.

That your petitioner is informed and believes that the plaintiff, Maude E. Semon, relying upon said decree, married one Edward C. Kimball on the 29th day of June, 1895; but your petitioner has not married since said decree was made, and being a resident and citizen of the State of New York at the time of the service on him of the summons as aforesaid, and ever since, your petitioner is now advised by counsel that it would be impossible for him to
59 marry again in view of the erroneous recital in the decree as aforesaid to the effect that your petitioner did not appear or answer in said action but made default therein, as the laws of the State of New York do not regard a decree of divorce against a non-resident defendant granted by default by the courts of another State as of any binding effect outside of the State in which it was granted, in cases where there is no appearance in the action by the non-resident defendant or no service of process on him within the State wherein the decree is granted.

That your petitioner desires that his said answer, or the copy thereof hereto annexed, be filed herein *nunc pro tunc* by leave of this court, and that said decree be amended *nunc pro tunc* so as to recite the appearance of your peti-oner in order that said decree may conform to the facts as they existed at the time it was granted, and may show upon its face that your petitioner appeared and answered and submitted himself to the jurisdiction of this court in this action. Your petitioner desires thereby to make the decree of as binding effect in the State of New York where your petitioner resided when said action was commenced and ever since has resided, as said decree has in the State of North Dakota, and in order that your petitioner may not violate the laws of the State of New York in case of his remarriage at any time hereafter to any person other than the plaintiff during her lifetime.

Wherefore your petitioner prays this honorable court, in the furtherance of justice, that the said answer, or the copy thereof hereto annexed, be, by leave of this court filed herein *nunc pro tunc* as of the date of its service, as aforesaid, on the plaintiff's attorneys, Winterer & Winterer, and that said decree made herein and dated the 26th day of January, 1891, and filed in the office of the clerk of the district court for the county of Barnes, North Dakota, on the 29th day of January, 1891, be amended *nunc pro tunc* as of the 26th day of January, 1891, by striking out therefrom the recitals setting

forth "that the defendant failed to answer, demur, or to make
60 any appearance whatever, as by the summons and the law required in such case, but instead thereof made default; that upon such default" and by inserting in lieu thereof the following words "the defendant having appeared herein and answered and submitted himself to the jurisdiction of the court;" and for such further and other relief as may be meet.

And your petitioner will ever pray.

Dated, December 1st, 1896.

JAMES L. SEMON, *Petitioner.*

STATE OF NEW YORK, }
City and County of New York, } ss:

James L. Semon, being duly sworn, deposes and says that he is the defendant in the above-entitled action and the person mentioned in and who subscribed the foregoing petition; that he has read the foregoing petition and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

JAMES L. SEMON.

Subscribed and sworn to before me this first day of December, 1896.

F. W. LONGFELLOW,

[L. S.] *Notary Public* (55), *New York County, N. Y.*

STATE OF NEW YORK, }
City and County of New York, } ss:

I, Henry D. Purroy, clerk of the city and county of New York, and also clerk of the supreme court for the said city and county, the same being a court of record, do hereby certify, that F. W. Longfellow, before whom the annexed deposition was taken, was, at the time of taking the same, a notary public of New York,
61 dwelling in said city and county, duly appointed and sworn, and authorized to administer oaths to be used in any court in said State, and for general purposes; that I am well acquainted with the handwriting of the said notary, and that his signature thereto is genuine, as I verily believe.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court and county, the 1 day of Dec., 1896.

[SEAL.] HENRY D. PURROY, *Clerk.*

(Endorsed:)

STATE OF NORTH DAKOTA, }
County of Barnes, } ss:

Fifth Judicial District Court.

Filed in the office of the clerk of the district court for the county of Barnes, North Dakota, this 16 day of Dec., 1896.

H. O. STERL,
Clerk of said Court.

"A."

NEW YORK, *Oct.* 23, '90.

Mr. Herman Winterer.

DEAR SIR: In reply to the contents of paper served on me Oct. 15, 1890, by your representative, relative to my wife and children, I would say that my — has sworn to matters untrue. For instance, this matter of desertion, this is surprising to me, as my wife personally ordered me from the house and stated that she never wished to see me again, this was the fore part of September, 1889. I did as I was ordered, having no alternative, as I was living under her mother's roof. Now is it at all likely that a domesticated
62 man (as my wife will tell you I was) would give up a good home, without good reasons for so doing? It was only a short time after I left the house, that they moved and took up another dwelling place, I never receiving any notification where I could see my children. I have meditated over this matter more than once, and have often wondered why it was done. It is now over a year ago, since I saw my children last.

In relation to my not providing for her I would say, that I have always given what I had, and very often more than I could afford. I am now carrying on the painting business which was left to me by my father who is now dead. When I came into possession of the business it was very much in debt. I have been trying ever since I took it to wipe out this burden, but as yet have not fully accomplished my aim and desire. There were times when I was not doing very much in my business, and consequently could not provide as promptly as I would like to. My wife swearing that I did not provide for her the common necessaries of life simply tells an untruth.

As to my drinking habits, I will admit that I have indulged a little too much at times, but now have got bravely over that, having not tasted it in over a year. As the father of my children I was glad to hear of their existence, and hope in the near future of having the pleasure of seeing my own flesh and blood.

Very respectfully,

JAS. L. SEMON,
803 9 *Ave., N. Y. C.*

CITY & COUNTY OF NEW YORK, *ss:*

Jas. L. Semon being duly sworn deposes and says that he is
63 the writer of the foregoing letter, that he knows the contents thereof, and that it is absolutely true in every particular.

JAS. L. SEMON. [L. S.]

Subscribed and sworn to before me this 23rd day of October, 1890.

[L. S.]

JAS. T. CLARK,
Notary Public for Co. of N. Y.

(Endorsed :)

STATE OF NORTH DAKOTA, } ss:
County of Barnes, }

Fifth Judicial District Court.

Filed in the office of the clerk of the district court for the county of Barnes, North Dakota, this 16 day of Dec., 1896.

H. O. STERL,
Clerk of said Court.

"A."

NEW YORK, *Oct.* 23, '90.

Mr. Herman Winterer.

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64

In relation to my not providing for her I would say that I have always given what I had, and very often more than I could afford. I am now carrying on the painting business which was left to me by my father who is now dead. When I came into possession of the business it was very much in debt. I have been trying ever since I took it to wipe out this burden, but as yet have not fully accomplished my aim and desire. There were times when I was not doing very much in my business, and consequently could not provide as promptly as I would like to. My wife swearing that I did not provide for her the common necessaries of life simply tells an untruth.

As to my drinking habits, I will admit that I have indulged a little too much at times, but now have got bravely over that, having not tasted it in over a year. As the father of my children I was glad to hear of their existence, and hope in the near future of having the pleasure of seeing my own flesh and blood.

Very respectfully, JAS. L. SEMON,
803 9 *Ave., N. Y. C.*

CITY AND COUNTY OF NEW YORK, *ss:*

Jas. L. Semon being duly sworn deposes and says that he is the writer of the foregoing letter, that he knows the contents thereof, and that it is absolutely true in every particular.

JAS. L. SEMON. [L. S.]

Subscribed and sworn to before me this 23rd day of October, 1890.
[L. S.] JAS. T. CLARK,
Notary Public for Co. of N. Y.

65 (Endorsed.)

STATE OF NORTH DAKOTA, } ss:
County of Barnes, }

Fifth Judicial District Court.

Filed in the office of the clerk of the district court for the county of Barnes, North Dakota, this 28 day of Oct., 1890.
H. O. STERL,
Clerk of said Court.

STATE OF NORTH DAKOTA, } ss:
County of Barnes, }

District Court, 5th Judicial District.

I hereby certify that I have carefully compared the within instrument with the original now on file in this office and that it is a true and correct copy of the same.
In witness whereof, I have hereunto set my hand and official seal this 16 day of Dec., A. D. 1896.
[Seal of said Court.]
H. O. STERL,
Clerk Dist. Court within and for Barnes Co., N. D.

EXHIBIT B.

STATE OF NORTH DAKOTA, } ss:
County of Barnes, }

In District Court, Fifth Judicial District.

MAUDE E. SEMON, Plaintiff,
vs.
JAMES L. SEMON, Defendant.

Decree for Plaintiff of Divorce "a Vinculo Matrimonii."

(As amended *nunc pro tunc* by order of the court, dated December 16, 1896.)

This cause being brought by the above-named plaintiff, Maude E. Semon, to obtain a divorce "*a vinculo matrimonii*" from the above-named defendant, James L. Semon, on the ground of willful desertion and neglect, and it appearing to the court from the pleadings and papers on file in said cause; that the summons
66 therein has been duly served on said defendant by an order heretofore made by and from this court, for the publication of said summons, and then and thereafter as an equivalent to such publication as by statute in such case made and provided, personal

service was secured on said defendant in the State of New York, —— the defendant having appeared herein and answered and A [that the defendant failed to answer, demur, or to]* and submitted himself to the jurisdiction of the court; [make any appearance whatever, as by the summons and the law required in such case, but instead thereof made default; that upon such default,]* and upon the application of the plaintiff, the court on the 3rd day of January, 1891, duly referred this cause, by an order to John Anderson, a notary public within and for the county of Barnes and State of North Dakota, of Valley City, of said county and State, as referee, to take the evidence in the above-entitled action material to the allegations of said complaint, in the form of written questions and answers and report the same to this court; and the said referee having taken the testimony by written questions and answers, and reported the same to the court, and in all things obeyed the order of the court; and an application having been duly made to this court, representing that Mrs. Sarah C. McKee, William McKee, Sophia M. Drake and Mrs. C. Baker, all residing in the county of Kings and State of New York, were material witnesses on the part of the plaintiff in said cause, and that the personal attendance of said witnesses could not be procured at the trial of said action, the court duly appointed J. George Flammer, a notary public in and for the county of New York, and State of New York, of said city and State, sole commissioner to take the testimony of said witnesses upon the interrogatories attached to his said commission of appointment, and none others, and to return said testimony when duly signed and certified, together with said commission and the papers thereto annexed, to the clerk of this court, at Valley City, North Dakota, and the said commissioner having taken the testimony of the said
67 witnesses as required by said commission and reported the same to the clerk of this court, and in all things obeyed the order of the court, from which it appears that all the material allegations of the complaint aforesaid, are proven by testimony free from all legal exceptions, as to the competency, admissibility and sufficiency thereof; that said matter so alleged and proven in behalf of the plaintiff is sufficient to entitle her to the relief prayed for in her complaint; that the plaintiff was a resident of Barnes county and State of North Dakota at the commencement of this action, and had been for more than ninety days next preceding; that for more than one year immediately and next preceding the commencement of this action, said defendant had wilfully and without cause, deserted said plaintiff, and also since and during the time of his said desertion, had wilfully and without cause wholly neglected to provide said plaintiff and her two children born as the issue of the marriage with defendant, with the common necessaries of life, and while plaintiff was a resident of this county and State aforesaid, said defendant continuously so deserted and neglected to provide

The within decree amended by order of the court, dated Dec. 16th, 1896.

[* Words enclosed in brackets erased in copy.]

for said plaintiff and her said two children, and still continues to do so; that said plaintiff and defendant intermarried on the 12th day of May, 1885, and that the issue of said marriage, is Edna Kate Semon, born on the 8th day of June, 1886, and Randolph Alexander Semon, born on the 6th day of August, 1887, and that the same are now living.

Now, therefore, on motion of Winterer & Winterer, counsel for plaintiff, it is ordered, adjudged and decreed, by the court that the bonds of matrimony heretofore entered into between the said plaintiff, Maud E. Semon, and the said defendant, James L. Semon, on the 12th day of May, 1885, be hereby and are dissolved, and the said parties are and each of them is freed and absolutely released from the bonds of matrimony and all the obligations thereof; that the custody, care and education of the said children, the issue of the said marriage, be hereby and is awarded to the plaintiff, of
68 which all persons interested are to take notice and govern themselves accordingly.

Dated at the city of Jamestown, county of Stutsman and State of North Dakota, this 26th day of January, 1891.

RODERICK ROSE, *Judge.*

Attest: H. O. STERL, *Clerk,*
By M. G. CUSHING, *Deputy.*

[Seal of said Court.]

(Endorsed.)

STATE OF NORTH DAKOTA, } ss:
County of Barnes, }

Fifth Judicial District Court.

Filed in the office of the clerk of the district court for the county of Barnes, North Dakota, this 29th day of January, 1891.

H. O. STERL,
Clerk of said Court,
By M. G. CUSHING, *Deputy.*

STATE OF NORTH DAKOTA, } ss:
County of Barnes, }

In District Court, Fifth Judicial District.

I, H. O. Sterl, clerk of the district court in and for said county and State, do hereby certify that I have compared the papers in writing to which this certificate is attached with the decree of divorce filed in my office on the 29th day of January, A. D. 1891, in the above and foregoing action, to wit: Maud E. Semon *vs.* James L. Semon, and that the same is a true and correct copy of said decree and the whole thereof.

Seal of said Court.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court at Valley City said county and State, this 23rd day of December, A. D. 1896.

H. O. STERL, *Clerk.*

69 STATE OF NORTH DAKOTA, } ss:
County of Barnes, }

I, Roderick Rose, judge of the fifth judicial district of the State of North Dakota, do hereby certify that H. O. Sterl, whose name is subscribed to the foregoing certificate of attestation, now is, and was at the time of signing and sealing the same, clerk of the district court of Barnes county aforesaid (which county is in the fifth judicial district) and keeper of the records and seal thereof, duly elected and qualified to office; that full faith and credit are and of right ought to be given to all his official acts as such in all courts of record and elsewhere; and that his said attestation is in due form of law and by the proper officer.

Given under my hand and seal this 23rd day of December, 1896.

RODERICK ROSE, [SEAL.]
District Judge.

STATE OF NORTH DAKOTA, } ss:
County of Barnes, }

I, H. O. Sterl, clerk of the district court in and for said county, in the State aforesaid, do hereby certify that Roderick Rose, whose genuine signature is appended to the foregoing certificate was, at the time of signing the same, judge of the district court of the fifth judicial district of the State of North Dakota (of which judicial district the said Barnes county forms a part), duly commissioned and qualified; that full faith and credit are and of right ought to be given to all his official acts as such, in all courts of record and elsewhere.

Seal of said Court. In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at my office in Valley City, in said county and State, this 23rd day of December, A. D. 1896.

H. O. STERL, *Clerk.*

70 I, C. M. Dahl, by William O. De Puy, deputy secretary of state in and for the State of North Dakota, do hereby certify that the district court of the fifth judicial district, including the county of Barnes, in the State of North Dakota, is organized and existing under, by virtue of and pursuant to the constitution and laws of the State of North Dakota; that said court is a court of general jurisdiction; that the present judge of said court is the Hon. Roderick Rose, the identical person who has signed the annexed certificate. That I am acquainted with the signature of the said judge and know that the signature attached to said certificate purporting to be his signature is in his handwriting and is genuine.

Dated December 23d, A. D. 1896.

C. M. DAHL,
Secretary of State,
By WILLIAM O. DE PUY,
Deputy Sec. of State.

[SEAL.]

71 Kings County Surrogate's Court.

In the Matter of the Application for Letters of Administration on the Goods, Chattels, and Credits which were of EDWARD C. KIMBALL, Deceased, and for the Revocation of Letters Issued to HARRIET A. KIMBALL and JOHN S. JAMES on November 10th, 1896.

Before Hon. George B. Abbott, surrogate.

SURROGATE'S COURT, BROOKLYN, *January 20th*, 1897.

Appearances of Counsel.

For the petitioner, W. Harlock, Esq.
For the respondent-, Messrs. Arnold & Greene, by Mr. Arnold.

Mr. ARNOLD: I offer in evidence exemplified copy of the judgment-roll in the matter of Maude E. Semon *vs.* James L. Semon in the district court of the State of North Dakota, for the fifth judicial district county of Barnes.

Marked "Respondents' Exhibit 1, January 20th, 1897," being Exhibits A, B, C, D, E, F, G, H, I, J, and A 1, annexed to respondents' answer and printed in the foregoing pages, 24 to 45.

Mr. HARLOCK: I offer in evidence exemplified copy of the proceedings of the district court of North Dakota, amending a decree of divorce in that court January 26th, 1891, being Exhibit A annexed to the petitioner's reply. Also an exemplified copy of the said decree of divorce as amended, bearing date the 16th
72 day of December, 1896, being Exhibit B, claiming that these two papers, A and B, as well as the decree of the alleged judgment-roll offered in evidence by respondents, are the entire judgment-roll of that case in that court.

Mr. ARNOLD: I object to the proceedings taken in the court of North Dakota to amend the judgment-roll, on the ground that they are incompetent, irrelevant and immaterial; that these respondents had no notice of these proceedings and are not parties to it; that the rights acquired by Mrs. Kimball and Mrs. James, two of the respondents, as heirs-at-law and next of kin of Edward C. Kimball, deceased, in real and personal estate left by him, are not and cannot in anywise be affected or impaired by such proceedings or the order or decree of the court made therein; and that said proceedings and the order or decree made therein do not in any manner affect the question of the validity of the alleged marriage between said Kimball and the petitioner herein. The papers referred to are marked Petitioner's Exhibits A and B, January 20th, 1897, being Exhibits A and B annexed to petitioner's reply and printed in the foregoing pages, 49 to 69.

The evidence is taken subject to the objection, and will be passed upon on consideration of the matter, with an exception to be granted to the party against whom the ruling may be made.

Mr. HARLOCK: I also offer in evidence the Compiled Laws of the Territory of Dakota of 1887, and the Revised Codes of the State of North Dakota of 1895, to show that these proceedings were regular and sufficient; and that the divorce was legal and valid under those laws.

Same objection on the grounds above stated and same disposition, with the same objection to be allowed as to the previous offer.

The following facts are admitted subject to the objection and exception of either party:

73 First. The respondents admit that they and Edward C. Kimball, the deceased, knew at the time the petitioner was married to Kimball that the petitioner was a divorced woman at that time, but they had no knowledge as to the methods by which such divorce was obtained, nor whether it was valid. They did not know at the time of such marriage whether James L. Semon, former husband of the petitioner, was living or not; but subsequently ascertained that he was living.

Second. The petitioner admits that she was living in North Dakota from June 5th, 1890, to February 5th, 1891.

Third. The petitioner admits that at the time when she commenced her action for divorce against James L. Semon, in the district court of North Dakota, Semon was a resident of the State of New York, and that he ever since has been a resident of such State.

W. HARLOCK,
Attorney for Petitioner.
ARNOLD & GREENE,
Attorneys for Respondents.

Petitioner rests.

The SURROGATE: I will mark it submitted and briefs may be presented within two weeks.

The surrogate subsequently handed down a memorandum overruling the objections made by Mr. Arnold and granting him an exception thereon.

74 *Extracts from Compiled Laws of the Territory of Dakota of* 1887, *which Became Laws of the State of North Dakota on its Admission to the Union.*

The State of North Dakota was duly admitted into the Union by proclamation issued by the President of the United States on November 2d, 1889.

The constitution of the State of North Dakota was adopted on October 1st, 1889, and section 2 of article 20 of the said constitution is as follows: "All laws now in force in the Territory of Dakota, which are not repugnant to this constitution, shall remain in force until they expire by their own limitations or be altered or repealed."

The laws of the Territory of Dakota in force at the time of the commencement of the action for divorce referred to in the answer of the respondents herein, and the laws of the State of North Da-

kota at the times mentioned in the petition, answer and reply herein, provided, among other things, as follows:

The organic law, page 20, Compiled Laws of Territory of Dakota, 1887, provides as follows:

SECTION 39. Hereafter the supreme court of the Territory of Dakota shall consist of a chief justice and five associate justices, any five of whom shall constitute a quorum.

SECTION 41. Said Territory shall be divided into six judicial districts, and a district court shall be held in each district by one of the justices of the supreme court at such time and place as may be prescribed by law.

The following are provisions of the Compiled Laws of the Territory of Dakota of 1887:

SECTION 2501. Law is a rule of property and of conduct prescribed by the sovereign power.

SECTION 2502. The will of the sovereign power is expressed:

1. By the organic act passed by Congress creating a temporary government in this Territory and vesting the legislative
75 power in the governor and a legislative assembly, and extending it to all rightful subjects of legislation consistent with the Constitution of the United States and that act.

2. By other statutes enacted by Congress or by the legislative assembly.

SEC. 2558. Marriage is dissolved only:

1. By the death of one of the parties; or,

2. By the judgment of a court of competent jurisdiction decreeing a divorce of the parties. The effect of a judgment decreeing a divorce is to restore the parties to the state of unmarried persons. The district court in each county or subdivision has such jurisdiction in an action.

SEC. 2559. Divorces may be granted for any of the following causes:

1. Adultery.
2. Extreme cruelty.
3. Willful desertion.
4. Willful neglect.
5. Habitual intemperance.
6. Conviction for felony.

SEC. 2561. Extreme cruelty is the infliction of grievous bodily injury or grievous mental suffering upon the other by one party to the marriage.

SEC. 2562. Willful desertion is the voluntary separation of one of the married parties from the other with intent to desert.

1. Persistent refusal to have reasonable matrimonial intercourse as husband and wife, when health or physical condition does not make such refusal reasonably necessary, or the refusal of either party to dwell in the same house with the other party, when there is no just cause for such refusal, is desertion.

2. When one party is induced by the stratagem or fraud of the other party to leave the family dwelling place, or to be absent, and during such absence the offending party departs with intent to de-

sert the other, it is desertion by the party committing the stratagem or fraud, and not by the other.

76 3. Departure or absence of one party from the family dwelling place, caused by cruelty or by threats of bodily harm from which danger would be reasonably apprehended from the other is not desertion by the absent party, but it is desertion by the other party.

4. Separation by consent, with or without the understanding that one of the parties will apply for a divorce, is not desertion.

5. Absence or separation, proper in itself, becomes desertion whenever the intent to desert is fixed during such absence or separation.

6. Consent to a separation is a revocable act, and if one of the parties afterwards, in good faith, seeks a reconciliation and restoration, but the other refuses it, such refusal is desertion.

7. If one party deserts the other, and before the expiration of the statutory period required to make the desertion a cause of divorce, returns and offers in good faith to fulfil the marriage contract, and solicits condonation, the desertion is cured. If the other party refuse such offer and condonation, the refusal shall be deemed and treated as desertion by such party from the time of the refusal.

8. The husband may choose any reasonable place or mode of living, and if the wife does not conform thereto, it is desertion.

9. If the place or mode of living selected by the husband is unreasonable and grossly unfit, and the wife does not conform thereto, it is desertion on the part of the husband from the time her reasonable objections are made known to him.

SEC. 2563. Willful neglect is the neglect of the husband to provide for his wife the common necessaries of life, he having ability to do so; or it is the failure to do so by reason of idleness, profligacy or dissipation.

SEC. 2564. Habitual intemperance is that degree of intemperance from the use of intoxicating drinks which disqualifies the person a great portion of the time from properly attending to business, or which would reasonably inflict a course of great mental anguish upon the innocent party.

77 SEC. 2565. Willful desertion, willful neglect or habitual intemperance must continue for one year before either is a ground for divorce.

SEC. 2566. Divorces must be denied upon showing:

1. Connivance; or,
2. Collusion; or,
3. Condonation; or,
4. Recrimination; or,
5. Limitation and lapse of time.

SEC. 2567. Connivance is the corrupt consent of one party to the commission of the acts of the other, constituting the cause of divorce. Corrupt consent is manifest by passive permission, with intent to connive at or actively procure the commission of the acts complained of.

SEC. 2568. Collusion is an agreement between husband and wife that one of them shall commit, or appear to have committed, or to

be represented in court as having committed acts constituting a cause of divorce, for the purpose of enabling the other to obtain a divorce.

SEC. 2569. Condonation is the conditional forgiveness of a matrimonial offense constituting a cause of divorce.

SEC. 2570. The following requirements are necessary to condonation:

1. A knowledge on the part of the condoner of the facts constituting the cause of divorce.

2. Reconciliation and remission of the offense by the injured party.

3. Restoration of the offending party to all marital rights.. Condonation implies a condition subsequent, that the forgiving party must be treated with conjugal kindness. Where the cause of divorce consists of a course of offensive conduct, or arises in cases of cruelty from excessive acts of ill-treatment, which may, aggregately, constitute the offense, cohabitation, or passive endurance, or conjugal kindness, shall not be evidence of condonation of any of the acts constituting such cause, unless accompanied by an express agreement to condone. In such cases, condonation can be made
78 only after the cause of divorce has become complete, as to the acts complained of. A fraudulent concealment by the condonee of facts constituting a different cause of divorce from the one condoned, and existing at the time of condonation, avoids such condonation.

SEC. 2571. Condonation is revoked and original cause of divorce revived:

1. When the condonee commits acts constituting a like or other cause of divorce; or,

2. When the condonee is guilty of great conjugal unkindness, not amounting to a cause of divorce, but sufficiently habitual and gross to show that the conditions of condonation had not been accepted in good faith, or not fulfilled.

SEC. 2578. A divorce must not be granted unless the plaintiff has, in good faith, been a resident of the Territory ninety days next preceding the commencement of the action.

SEC. 2579. In actions for divorce, the presumption of law that the domicile of the husband is the domicile of the wife, does not apply. After separation each party may have a separate domicile, depending for proof upon actual residence, and not upon legal presumptions.

SEC. 2580. No divorce can be granted upon the default of the defendant, or upon the uncorroborated statement, admission or testimony of the parties, or upon any statement or finding of fact made by a referee; but the court must, in addition to any statement or finding of the referee, require proof of the facts alleged.

SECTION 3279. The proof or acknowledgement of an instrument may be made without the Territory, but within the United States, and within the jurisdiction of the officer, before either * * *

3. A notary public.

* * * * * * * *

SECTION 3288. 4. Officers taking and certifying acknowledgments or proof of instruments for record must authenticate their certificates by affixing thereto their signatures followed by the names of
79 their offices; also their seals of office, if by the laws of the Territory, State or county where the acknowledgment or proof is taken, or by authority by which they are acting they are required to have official seals.

SECTION 4715. The law respects form less than substance.

SECTION 4716. That which ought to have been done is to be regarded as done in favor of him to whom, and against him from whom performance is due.

SECTION 4728. An interpretation which gives effect is preferred to one which makes void.

SECTION 4817. The following are the courts of justice of this Territory: 1. The supreme court. 2. The district courts. * * *

SECTION 4824. The district courts possess chancery as well as common-law jurisdiction.

SECTION 4825. They have exclusive original jurisdiction in all actions or proceedings in chancery * * * and in all actions for divorce, and to obtain a decree of nullity of marriage.

SECTION 4890. In all other cases (to wit, cases other than those relating to real property) the action shall be tried in the judicial subdivision in which the defendant resides * * * or if none of the defendants reside in the Territory, the same may be tried in any county which the plaintiff shall designate in his complaint.

SECTION 4891. If the county designated for that purpose in the complaint be not the proper county, the action may, notwithstanding, be tried therein unless the defendant, before the time for answering expire, demands in writing that the trial be had in the proper county. * * *

SECTION 4892. Civil actions in the courts of this Territory shall be commenced by the service of a summons.

SECTION 4893. The summons shall be subscribed by the plaintiff or his attorney, and directed to the defendant, and shall require him to answer the complaint and serve a copy of his answer on the person whose name is subscribed to the summons at the place
80 within the Territory to be therein specified, in which there is a post-office, within thirty days after the service of the summons, exclusive of the day of service.

SECTION 4900. Where the person on whom the service of the summons is to be made, cannot, after due diligence, be found within the Territory and that fact appears by affidavit to the satisfaction of the court or a judge thereof, and it in like manner appears that a cause of action exists against the defendant in respect to whom the service is to be made; * * * such court or judge may grant an order that the service be made by the publication of a summons in either of the following cases: * * *

5. When the action is for divorce, or for a decree annulling a marriage * * *

When publication is ordered, personal service of a copy of the

summons and complaint out of the Territory is equivalent to publication.

SECTION 4904. From the time of the service of the summons in a civil action, or the allowance of a provisional remedy, the court is deemed to have acquired jurisdiction, and to have control of all the subsequent proceedings.

A voluntary appearance of a defendant is equivalent to personal service of the summons upon him.

SECTION 4908. The only pleading on the part of defendant is either a demurrer or an answer. It must be served within 30 days after the service of a copy of the complaint.

SECTION 4914. The answer of the defendant must contain: 1. A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief.

SECTION 4921. Every pleading in a court of record must be subscribed by the party or his attorney; and when any pleading is verified, every subsequent pleading except a demurrer must be verified also.

SECTION 4922. The verifications must be to the effect that the same is true to the knowledge of the person making it, except as to those matters stated upon information and belief,
81 and as to those matters he believes it to be true. * * * Such verification must be by the affidavit of the party.

SECTION 4924. In the construction of a pleading for the purpose of determining its effect, its allegations shall be liberally construed with a view of substantial justice between the parties.

SECTION 4938. The court may, before or after judgment, in furtherance of justice and on such terms as may be proper, amend any pleading, process or proceeding, by adding or striking out the name of any party; or by correcting a mistake in the name of a party, or a mistake in any other respect; or by inserting other allegations material to the case; or when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved.

SECTION 4939. The court may, likewise, in its discretion, and upon such terms as may be just, allow an answer or reply to be made, or other act to be done after the time limited by this code or by an order, enlarge such time, and may also, in its discretion, and upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect, and may supply an omission in any proceeding; and whenever any proceeding taken by a party fails to conform in any respect to the provisions of this code the court may, in like manner, and upon like terms, permit an amendment of such proceedings, so as to make it conformable thereto.

SECTION 4941. The court shall, in every stage of action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect.

SEC. 5260. When defendant permitted to defend. The defendant, upon whom service by publication is made, or his representatives, on application and sufficient cause shown at any time before
82 judgment, must be allowed to defend the action; and. except in an action for divorce, the defendant, upon whom service by publication is made, or his representatives, may, in like manner upon good cause shown, be allowed to defend, after judgment, or at any time within one year after notice thereof and within seven years after its rendition, on such terms as may be just; and, if the defense is successful and the judgment or any part thereof has been collected or otherwise enforced, such restitution may thereupon be compelled as the court directs, but the title to property sold under such judgment to a purchaser in good faith shall not be thereby affected.

SECTION 5281. An affidavit may be used to verify a pleading.
* * *

SECTION 5282. An affidavit may be made in and out of this Territory before any person authorized to administer an oath.

SECTION 5329. Service by mail may be made where the person making the service and the person on whom it is to be made reside in different places, between which there is a regular communication by mail.

SECTION 5330. In case of service by mail the paper must be deposited in the post-office, addressed to the person on whom it is to be served, at his place of residence, and the postage paid.

SECTION 5336. Where a party shall have an attorney in the action, the service of papers shall be made upon the attorney instead of the party.

SECTION 5339. If any process original pleadings or any other paper be lost or withheld by any person, the court may authorize a copy thereof to be filed and used instead of the original.

SECTION 5341. It shall not be necessary to entitle an affidavit in the action, but an affidavit made without a title or with a defective title, shall be as valid and effectual, for every purpose, as if it were duly entitled, if it intelligently refer to the action or proceeding in which it is made.

83 *Extract from Revised Codes of North Dakota*, 1895.

SEC. 5415. Origin and classes of issues. Issues arise upon the pleadings when a fact or conclusion of law is maintained by the one party and controverted by the other. There are two kinds.

1. Of law.
2. Of fact.

SEC. 5417. Of fact classified. The issue of fact arises upon the material allegations in the complaint controverted by the answer.
* * *

SEC. 5419. Trial defined. A trial is the judicial examination of the issues between the parties whether they are issues of law or of fact.

SEC. 5421. Issues of fact how tried. All issues of fact triable by a

jury or by a court must be tried before a single judge. Issues of fact must be tried at a regular term of the district court when the trial is by jury, otherwise at a regular or special term as the court may by its rules prescribe. * * *

SEC. 5422. Note of issue, &c. At any time after issue and at least ten days before the court, either party may give notice of trial. The party giving the notice shall furnish the clerk at least eight days before the court with a note of the issue containing the title of the action, the names of the attorneys and the time when the last pleading was served, and the clerk shall thereupon enter the cause upon the calendar according to the date of the issue. * * *

SEC. 5423. Either party proceeds, &c. Either party, when the case is reached upon the calendar, and in the absence of the adverse party, unless the court for good cause otherwise directs, may proceed with his case and take a dismissal of the complaint or a verdict or judgment as the case may require.

SEC. 5479. Judgment entered by the clerk on order. Judgment upon issue of law or fact or upon confession or upon failure
84 to answer may be entered by the clerk upon order of the court or of the judge thereof.

SEC. 5480. Notice of entry of judgment served. Within ten days after entry of judgment in an action in which an appearance has been made, notice of such entry, together with a general description of the nature and amount of relief and damages thereby granted shall be served by the prevailing upon the adverse party.

SEC. 5489. Judgment-roll contents. Unless the party or his attorney shall furnish a judgment-roll, the clerk, immediately after entering judgment, shall attach together and file the following papers which shall constitute the judgment-roll:

1. In case the complaint is not answered by any defendant, the summons and complaint or copies thereof, the affidavit for service of summons by publication, if any, proof of service and that no answer has been received, the report, if any, and a copy of the judgment.

2. In all other cases, the summons, pleadings or copies thereof, the verdict, decision or report, the offer of the defendant, a copy of the judgment, the statement of the case, if any, and all orders and papers in any way involving the merits and necessarily affecting the judgment.

85 Kings County Surrogate's Court.

In the Matter of the Application *of* Letters of Administration of the Goods, Chattels, and Credits which were of EDWARD C. KIMBALL, Deceased, and for Revocation of Letters Issued, &c.

Opinion.

At the time of the marriage ceremony between the intestate and the petitioner a decree of divorce had been granted by a North Dakota court which purported to dissolve the marriage tie between the petitioner and her husband, James L. Semon, upon grounds

which are not recognized in this State as entitling the plaintiff to an absolute divorce.

The recitals of the decree and the judgment-roll showed that it had been granted upon a personal service of process upon the defendant in this State, and upon the defendant's default, and it appears that the defendant was, at the time of the commencement of the suit, and ever since has been, a resident of this State.

Upon these facts the marriage contract between the intestate and the petitioner was absolutely void.

O'Dea *vs.* O'Dea, 101 N. Y., 23.

No change or amendment of the decree or judgment-roll in the divorce proceedings was ever made during the lifetime of the intestate. Therefore, at the time of his death the decree of divorce was still absolutely void, and the relation of husband and wife between him and the petitioner had never in fact existed.

After the intestate's death an amendment of the original decree of divorce was procured, so as to recite the appearance of the defendant. The amendment was made *nunc pro tunc* as of the date of the original decree.

86 I am of the opinion that such an amendment could not be made after the intestate's death, so as to render valid and lawful a relation which had been absolutely void during his entire life, and which would have the effect of divesting property rights which had already attached to the intestate's assets.

Moreover, I am of the opinion, upon the undisputed facts, that the North Dakota court had not jurisdiction to make the amendment.

The letter which is in evidence and referred to as constituting the appearance of the defendant is not in any sense or upon any theory of practice an appearance in the suit. It is not entitled, is improperly verified, contains no demand for relief, and does not even contain any intimation of any intention on the part of the defendant to appear and submit himself to the jurisdiction of the court. It is a mere verified letter and nothing more.

But, if it has any force whatever in the suit, it is a pleading which raises an issue which entitled the defendant to a trial upon some sort of notice to him. The record does not show any such notice.

Application denied.

Dated March 1st, 1897.

GEO. B. ABBOTT, *Surrogate.*

87 Surrogate's Court, Kings County.

In the Matter of the Application for Letters of Administration of the Goods, Chattels, and Credits which were of EDWARD C. KIMBALL, Deceased, and for the Revocation of the Letters Issued to HARRIET A. KIMBALL and JOHN S. JAMES on the 10th Day of November, 1896.

Decision.

Harriet A. Kimball, Harriet I. James and John S. James, the respondents herein, request the surrogate to make the following findings of fact and conclusions of law, viz:

Findings of Fact.

First. The said Edward C. Kimball died in the city of Brooklyn on the 9th day of November, 1896, intestate, leaving him surviving his mother Harriet A. Kimball and his sister Harriet I. Kimball as his only next of kin, and on the 10th day of November, 1896, letters of administration on his estate were duly issued by the surrogate of Kings county to the said Harriet A. Kimball and to John S. James.

Found. G. B. A.

Second. The petitioner Maude E. Kimball was married on the 12th day of May, 1885, at the city of New York to one James L. Semon of said city.

Found. G. B. A.

88 Third. Subsequently the said petitioner left her said husband, and, in June, 1890, went to the State of North Dakota, where, in the month of September, 1890, she commenced an action in the district court. fifth judicial district of the said State of North Dakota, county of Barnes, for a divorce from her said husband.

Found. G. B. A.

Fourth. The said James L. Semon is and ever since his marriage to the said petitioner has been a resident of the State of New York; he was not served with the summons in said divorce suit in said State of North Dakota, nor did he appear in said action in person or by attorney, but said summons in said action was served upon him in the city of New York, on the 15th day of October, 1890. Such proceedings were thereafter had in said action that on the 26th day of January, 1891, said court made a decree granting a divorce to the petitioner from her said husband, in which decree it was recited that the summons and complaint were served on said Semon in the city of New York and that he did not appear in said action or serve any answer or demurrer to the complaint therein.

Found. G. B. A.

Fifth. The said petitioner went to North Dakota on the 5th day of June, 1890, and stayed there until the 5th day of February, 1891. During that period the domicile of her husband was in the State of New York. The petitioner went to North Dakota for the purpose of procuring a divorce from her husband on grounds not recognized

by the laws of the State of New York as sufficient cause for granting a divorce.

Found. G. B. A.

Sixth. On the 29th day of June, 1895, the petitioner went through a marriage ceremony in the city of Brooklyn with said Edward C. Kimball, deceased.

Found. G. B. A.

Seventh. The said deceased knew on the 29th day of June, 1895, that the petitioner was then a divorced woman, but he had
89 no knowledge as to the methods by which such divorce was obtained nor did he know that it was invalid. He did not know at the time he entered into said marriage contract with the petitioner whether James L. Semon was living, but ascertained subsequently that he was still living.

Found. G. B. A.

Eighth. After the death of said Edward C. Kimball, and in December, 1896, the said James L. Semon applied to the court of North Dakota, which granted the decree of divorce, to have a letter, which he sent to the plaintiff's attorneys after receiving the summons in the divorce action, filed in said court as his answer in the divorce suit *nunc pro tunc* as of the date of its receipt by the plaintiff's attorneys, and to have said decree of divorce, made on the 26th day of January, 1891, amended *nunc pro tunc* as of that date, by striking out the recital to the effect that the defendant failed to answer, demur or make any appearance in said divorce suit, and by inserting in place thereof the following words: "The defendant having appeared herein and answered and submitted himself to the jurisdiction of the court." Notice of said application was given only to the attorneys who appeared for the plaintiff in that divorce suit, and an order was made by the said court on the 16th day of December, 1896, on default of the plaintiff, granting said application, and purporting to amend said decree of divorce *nunc pro tunc* in accordance with said application, but said court did not have the power or jurisdiction to make such an order.

Found. G. B. A.

Conclusions of Law.

First. The court of North Dakota, which granted the decree of divorce to the petitioner from the said James L. Semon did not acquire jurisdiction of the said James L. Semon in that action, and the said decree of divorce made by said court was and is a nullity.

Found. G. B. A.

90 Second. The court of North Dakota did not have jurisdiction to make said order of December 16th, 1896, amending the said decree of divorce *nunc pro tunc*, and said order was and is a nullity.

Found. G. B. A.

Third. The said order of the court of North Dakota, dated December 16th, 1896, amending the decree of divorce *nunc pro tunc*, was not and is not binding upon the respondents herein, and did not

in anywise affect or impair their rights or interests as heirs and next of kin of said Edward C. Kimball, deceased, in the real and personal property left by him.

Found. G. B. A.

Fourth. The said petitioner was, when she entered into the marriage ceremony with said Edward C. Kimball, the wife of James L. Semon, and could not and did not contract a lawful marriage with said Edward C. Kimball.

Found. G. B. A.

Fifth. The said petitioner is not the widow of said Edward C. Kimball, deceased, and is not entitled, as such widow, to letters of administration on his estate.

Found. G. B. A.

Sixth. The said Harriet A. Kimball, the mother of said Edward C. Kimball, deceased, as one of the next of kin of said deceased, was entitled to letters of administration on his estate and to have John S. James joined with her in the administration of said estate.

Found. G. B. A.

Dated Brooklyn, March 6, 1897.

GEO. B. ABBOTT, *Surrogate.*

91 At a surrogate's court held in and for Kings county at the hall of records in the city of Brooklyn on the 8th day of March, 1897.

Present: Hon. George B. Abbott, surrogate.

In the Matter of the Application for Letters of Administration of the Goods, Chattels, and Credits which were of EDWARD C. KIMBALL, Deceased, and for the Revocation of the Letters Issued to HARRIET A. KIMBALL and JOHN S. JAMES on the 10th Day of November, 1896.

Decree Dismissing Petition of Maude E. Kimball.

An order having been granted by the surrogate's court in this matter on the 18th day of December, 1896, upon the petition of one Maude E. Kimball verified December 17, 1896, and upon the affidavits of Maude E. Kimball verified December 17, 1896, of Mame F. Cavendy and of William B. Smith, both verified on the same day, and on the petition of Harriet A. Kimball verified November 10, 1896, and all proceedings had thereon, that a citation issue herein to Harriet A. Kimball, John S. James and Harriet I. James requiring them to show cause on a day and hour to be named in said citation before the surrogate of Kings county why the prayer of said petitioner should not be granted and why the petitioner should not have such other relief as might be just; and in the meantime and until further order herein staying all proceedings on the part of said Harriet A. Kimball and John S. James, or either of them, as administratrix and administrator of the goods, &c., of Edward
92 C. Kimball, deceased; and a citation having thereupon issued as directed in said order, returnable on the 6th day of January, 1897, requiring the said Harriet A. Kimball and John S.

James, as administratrix and administrator of the goods, chattels, and credits which were of Edward C. Kimball, deceased, and the said Harriet I. James then to show cause why a decree should not be made revoking the letters of administration of the goods, chattels and credits which were of said Edward C. Kimball, deceased, heretofore and on the 10th day of November, 1896, issued to said Harriet A. Kimball and John S. James by the surrogate's court of the county of Kings; and why letters of administration on the estate of said deceased Edward C. Kimball should not be issued to Maude E. Kimball, as the widow of said deceased, and in the meantime, and until the further order of said court, staying all proceedings on the part of said Harriet A. Kimball and John S. James as such administratrix and administrator; and said citation having been returned and filed in this court, with proof of due service thereof on the parties therein named:

And the petitioner, having appeared on the return day of said citation by W. Harlock, Esq., her counsel; and the said Harriet A. Kimball and John S. James and Harriet I. James having appeared by L. H. Arnold, Esq., their counsel; and the said Harriet A. Kimball, John S. James and Harriet I. James having filed their answer to said petition; and the petitioner having thereafter filed a reply to said answer; and certain evidence having been submitted on behalf of the said petitioner and of said respondents; and the said petitioner and the said respondents having been heard by their counsel, and due deliberation having been thereupon had,

Now, on reading and filing said order of December 18, 1896, and said citation and all the papers on which the same were granted which are hereinbefore mentioned; the answer of the respondents and the reply of the petitioner thereto and all the proof sub-
93 mitted on behalf of the respective parties, including certain admitted facts contained in a written statement signed by the attorneys for the respective parties.

On motion of Arnold, Greene & Patterson, attorneys for the respondents,

It is ordered, adjudged and decreed that the petitioner the said Maude E. Kimball is not the widow of Edward C. Kimball, deceased, and is not entitled as his widow to letters of administration of the goods, chattels and credits which were of said Edward C. Kimball, deceased.

It is further ordered, adjudged and decreed that the application of said petitioner for the revocation of letters of administration heretofore, and on the 10th day of November, 1896, granted by the surrogate of Kings county to Harriet A. Kimball and John S. James of the goods, chattels and credits which were of Edward C. Kimball, deceased, and for letters of administration in favor of said petitioner of the goods, chattels and credits which were of said Edward C. Kimball, deceased, be dismissed.

And it is further ordered, adjudged and decreed that the stay of proceedings granted in said order of this court, bearing date the

18th day of December, 1896, and in the citation issued as therein provided, be vacated.

GEO. B. ABBOTT, *Surrogate.*

(A copy.)
JOSEPH W. CARROLL,
[L. S.] *Clerk of the Surrogate's Court.*

94 Surrogate's Court, Kings County.

In the Matter of the Application for Letters of Administration of the Goods, Chattels, and Credits which were of EDWARD C. KIMBALL, Deceased, and for the Revocation of the Letters Issued to HARRIET A. KIMBALL and JOHN S. JAMES on the 10th Day of November, 1896.

Petitioner's Requests to Find.

The petitioner hereby requests the surrogate to make the following findings of fact and conclusions of law, to wit:

Findings of Fact.

First. That Edward C. Kimball departed this life at the city of Brooklyn, county of Kings and State of New York, on the 9th day of November, 1896, intestate, and was at the time of his death and immediately prior thereto a resident of the county of Kings aforesaid.

Not found. G. B. A.

Second. That the petitioner, Maude E. Kimball, is the widow of said Edward C. Kimball, deceased.

Not found. G. B. A.

Third. That the said Edward C. Kimball was at the *the* time of his death the owner of certain personal property and of certain real estates.

Not found. G. B. A.

95 Fourth. That the said Edward C. Kimball left him surviving (the petitioner, Maude E. Kimball, his widow, and) the respondent Harriet A. Kimball, his mother, and Harriet I. James, his sister, his only next of kin.

Found except matter in parentheses. G. B. A.

Fifth. That the said Harriet A. Kimball presented a petition to the surrogate of Kings county, dated the 10th day of November, 1896, praying that letters of administration upon the estate of the said Edward C. Kimball, deceased, be issued to said Harriet A. Kimball and one John S. James, and that without notice or citation to said Maude E. Kimball, and without her knowledge or consent, and without any waiver from said Maude E. Kimball of her right to administer, said surrogate on the 10th day of November, 1896, issued letters of administration upon the estate of said Edward C. Kimball, deceased, to said Harriet A. Kimball and John S. James.

Found. G. B. A.

Sixth. The said petition of Harriet A. Kimball alleged, among

other things, that said Edward C. Kimball was unmarried at the time of his death and left him surviving no widow.

Found. G. B. A.

Seventh. That the allegation in said petition of Harriet A. Kimball that said Edward C. Kimball was unmarried at the time of his death and left him surviving no widow was false and untrue.

Not found. G. B. A.

Eighth. That the grant of said letters of administration upon the estate of said Edward C. Kimball, as aforesaid, was obtained by a false suggestion of a material fact; to wit, by the allegation that said Edward C. Kimball was unmarried at the time of his death, and left him surviving no widow.

Not found. G. B. A.

96 Ninth. That Maude E. Kimball, the petitioner, was (lawfully) married to said Edward C. Kimball, deceased, in the city of Brooklyn, on the 29th day of June, 1895 (and remained the wife of said Edward C. Kimball until his death).

Found, except as to matter in parentheses. G. B. A.

Tenth. That prior to said 29th day of June, 1895, said Maude E. Kimball had been lawfully divorced from her former husband, James L. Semon, by a decree of the district court of the fifth judicial district in and for the county of Barnes and State of North Dakota, duly given and made on the 26th day of January, 1891, and that thereby the bonds of matrimony theretofore entered into between the said Maude E. Kimball (then named Maude E. Semon) and the said James L. Semon on the 12th day of May, 1885, were dissolved, and they and each of them were freed and absolutely released from the bonds of matrimony and all the obligations thereof.

Not found. G. B. A.

Eleventh. That the said district court of the fifth judicial district in and for the county of Barnes and State of North Dakota had jurisdiction of the persons of said Maude E. Kimball (then named Maude E. Semon), and of said James L. Semon and of the subject-matter of said decree at the time of making such decree.

Not found. G. B. A.

Twelfth. That the said court had and obtained jurisdiction of the person of said James L. Semon, the defendant in the action for divorce, before making said decree.

Not found. G. B. A.

Thirteenth. That said decree was (duly) amended by said court on the 16th day of December, 1896, so as to recite the fact that the defendant James L. Semon had appeared in the action for divorce and answered and had submitted himself to the jurisdiction

97 of the court before the entry of the original decree in said action.

Found, except as to matter in parentheses. G. B. A.

Fourteenth. That at the time of the marriage of said Maude E. Kimball to said Edward C. Kimball, deceased, her previous marriage on the 12th day of May, 1885, to James L. Semon was not in force.

Not found. G. B. A.

Fifteenth. That the respondents and the said Edward C. Kimball, deceased, knew at the time the petitioner was married to said Edward C. Kimball that she was a divorced woman at that time.

Found. G. B. A.

Conclusions of Law.

First. That the petitioner, Maude E. Kimball, is entitled to administer upon the estate of said Edward C. Kimball, deceased.

Not found. G. B. A.

Second. That the grant of letters of administration upon the estate of said Edward C. Kimball to Harriet A. Kimball and John S. James was obtained by a false suggestion of a material fact.

Not found. G. B. A.

Third. That Harriet A. Kimball and Harriet I. James, next of kin of said deceased, and John S. James have no right and are not entitled to letters of administration upon the estate of said Edward C. Kimball as against the said Maude E. Kimball.

Not found. G. B. A.

Fourth. That the letters of administration upon the goods, chattels and credits of Edward C. Kimball, deceased, issued by the surrogate of Kings county on the 10th day of November, 1896, to Harriet A. Kimball and John S. James should be revoked and the same are hereby revoked.

Not found. G. B. A.

98 Fifth. That letters of administration upon the estate of said Edward C. Kimball, deceased, be issued to Maude E. Kimball, widow of said deceased.

Not found. G. B. A.

Dated March 19th, 1897.

W. HARLOCK,
Attorney for the Petitioner, Maude E. Kimball.

Surrogate's Court, Kings County.

In the Matter of the Application for Letters of Administration of the Goods, Chattels, and Credits which were of EDWARD C. KIMBALL, Deceased, and for the Revocation of the Letters Issued to HARRIET A. KIMBALL and JOHN S. JAMES on the 10th Day of November, 1896.

Exceptions.

The petitioner Maude E. Kimball hereby excepts to the findings and refusals to find herein made by Hon. Geo. B. Abbott, surrogate, filed in the office of the surrogate, Kings county, on the sixth day of March, 1897, and on the fourth day of April, 1897, and also to the decision and decree made by said surrogate herein dismissing the petition of said petitioner herein dated, entered and filed in said office on the 8th day of March, 1897, as follows:

99 *First Exception.*

Said petitioner excepts to each and every part of said decree.

Second Exception.

To the first finding of fact made and found at the request of the respondents herein, and to each and every part thereof.

Third Exception.

To the second finding of fact made and found at the request of the respondents herein, and to each and every part thereof.

Fourth Exception.

To the third finding of fact made and found at the request of the respondents herein, and to each and every part thereof.

Fifth Exception.

To the fourth finding of fact made and found at the request of the respondents herein, and to each and every part thereof.

Sixth Exception.

To the fifth finding of fact made and found at the request of the respondents herein, and to each and every part thereof.

Seventh Exception.

To the sixth finding of fact made and found at the request of the respondents herein, and to each and every part thereof.

Eighth Exception.

To the seventh finding of fact made and found at the request of the respondents herein, and to each and every part thereof.

100 *Ninth Exception.*

To the eighth finding of fact made and found at the request of the respondents herein, and to each and every part thereof.

Tenth Exception.

To the first conclusion of law made and found at the request of the respondents herein, and to each and every part thereof.

Eleventh Exception.

To the second conclusion of law made and found at the request of the respondents herein, and to each and every part thereof.

Twelfth Exception.

To the third conclusion of law made and found at the request of the respondents herein, and to each and every part thereof.

Thirteenth Exception.

To the fourth conclusion of law made and found at the request of the respondents herein, and to each and every part thereof.

Fourteenth Exception.

To the fifth conclusion of law made and found at the request of the respondents herein, and to each and every part thereof.

Fifteenth Exception.

To the sixth conclusion of law made and found at the request of the respondents herein, and to each and every part thereof.

101 *Sixteenth Exception.*

To the refusal of said surrogate to make and find the first finding of fact contained in petitioner's requests to find.

Seventeenth Exception.

To the refusal of said surrogate to make and find the second finding of fact contained in petitioner's requests to find.

Eighteenth Exception.

To the refusal of said surrogate to make and find the third finding of fact contained in petitioner's requests to find.

Nineteenth Exception.

To the refusal of said surrogate to make and find the fourth finding of fact contained in petitioner's requests to find.

Twentieth Exception.

To the refusal of said surrogate to make and find the seventh finding of fact contained in petitioner's requests to find.

Twenty-first Exception.

To the refusal of said surrogate to make and find the eighth finding of fact contained in petitioner's requests to find.

Twenty-second Exception.

To the refusal of said surrogate to make and find the ninth finding of fact contained in petitioner's requests to find.

102 *Twenty-third Exception.*

To the refusal of said surrogate to make and find the tenth finding of fact contained in petitioner's requests to find.

Twenty-fourth Exception.

To the refusal of said surrogate to make and find the eleventh finding of fact contained in petitioner's requests to find.

Twenty-fifth Exception.

To the refusal of said surrogate to make and find the twelfth finding of fact contained in petitioner's requests to find.

Twenty-sixth Exception.

To the refusal of said surrogate to make and find the thirteenth finding of fact contained in petitioner's requests to find.

Twenty-seventh Exception.

To the refusal of said surrogate to make and find the fourteenth finding of fact contained in petitioner's requests to find.

Twenty-eighth Exception.

To the refusal of said surrogate to make and find the first conclusion of law contained in petitioner's requests to find.

Twenty-ninth Exception.

To the refusal of said surrogate to make and find the second conclusion of law contained in petitioner's requests to find.

103 *Thirtieth Exception.*

To the refusal of said surrogate to make and find the third conclusion of law contained in petitioner's requests to find.

Thirty-first Exception.

To the refusal of said surrogate to make and find the fourth conclusion of law contained in petitioner's requests to find.

Thirty-second Exception.

To the refusal of said surrogate to make and find the fifth conclusion of law contained in petitioner's requests to find.

Dated New York, April 21st, 1897.

W. HARLOCK,

Attorney for Petitioner, 20 Nassau Street, New York City.

104 Surrogate's Court, Kings County.

In the Matter of the Application for Letters of Administration of the Goods, Chattels, and Credits which were of EDWARD C. KIMBALL, Deceased, and for the Revocation of the Letters Issued to HARRIET A. KIMBALL and JOHN S. JAMES on the 10th Day of November, 1896.

Notice of Appeal.

Take notice that Maude E. Kimball, the petitioner in the above-entitled matter, hereby appeals to the appellate division of the supreme court, in the second judicial department, from the decree entered herein on the eighth day of March, 1897, and from each and every part thereof, and that on such appeal the appellant will bring up for review both the law and the facts, and the said appeal is taken both on the law and the facts.

Dated April 5th, 1897.

WALDGRAVE HARLOCK,
Attorney for said Maude E. Kimball, Petitioner.

To Hon. George B. Abbott, surrogate of Kings county; to Arnold & Greene, Esqs., attorneys for Harriet A. Kimball and John S. James, administratrix and administrator, &c., of Edward C. Kimball, deceased, and Harriet I. James, respondents.

105 Surrogate's Court, Kings County.

In the Matter of the Application for Letters of Administration of the Goods, Chattels, and Credits which were of EDWARD C. KIMBALL, Deceased, and for the Revocation of the Letters Issued to HARRIET A. KIMBALL and JOHN S. JAMES on the 10th Day of November, 1896.

Undertaking on Appeal.

Whereas, on the eighth day of March, 1897, a decree was made by the above-named court in the above-entitled matter dismissing the application of Maude E. Kimball for the revocation of letters of administration granted by the surrogate of Kings county on November 10th, 1896, to Harriet A. Kimball and John S. James of the goods, &c., of Edward C. Kimball, deceased, and for letters in her favor.

And, whereas, the said Maude E. Kimball, feeling aggrieved thereby, intends to appeal therefrom to the appellate division of the supreme court in the second judicial department;

Now, therefore, we, William McKee, residing at No. 1170 Dean street, in the city of Brooklyn, county of Kings and State of New York, and Sarah C. McKee, also residing at No. 1170 Dean street, in said city of Brooklyn, do hereby, pursuant to the statute, jointly and severally undertake to and with the people of the State of New

York, that the appellant, Maude E. Kimball, will pay all
106 costs and damages which may be awarded against her upon the appeal, not exceeding two hundred and fifty dollars ($250).

Dated the 1st day of April, 1897.

WILLIAM McKEE.
SARAH C. McKEE.

CITY OF BROOKLYN, } ss.:
County of Kings, }

William McKee, being sworn, says that he is a resident and a freeholder within the State of New York, and worth double the sum specified in the above undertaking, over all the debts and liabilities which he owes or has incurred, and exclusive of property exempt by law from levy and sale under an execution.

WILLIAM McKEE.

Sworn to before me this 1st day of April, 1897.

THOS. W. HARRIS,
Notary Public, Kings Co.

CITY OF BROOKLYN, } ss.:
County of Kings, }

Sarah C. McKee, being sworn, says that she is a resident and freeholder within the State of New York, and worth double the sum specified in the above undertaking, over all the debts and liabilities which she owes or has incurred, and exclusive of property exempt by law from levy and sale under an execution.

SARAH C. McKEE.

Sworn to before me this 1st day of April, 1897.

THOS. W. HARRIS,
Notary Public, Kings Co.

107 STATE OF NEW YORK, } ss.:
County of Kings, }

I certify that on this first day of April, 1897, before me personally appeared the above-named William McKee and Sarah C. McKee, to me known and known to me to be the individuals described in, and who executed the above undertaking, and severally acknowledged that they executed the same for the uses and purposes therein mentioned.

THOS. W. HARRIS,
[L. S.] *Notary Public, Kings Co., N. Y.*

We hereby consent that the foregoing case be settled, ordered filed, and annexed to the judgment-roll without further notice.

May 25, 1897.

W. HARLOCK,
Attorney for Petitioner.
ARNOLD & GREENE,
Attorneys for Respondents.

The foregoing case, containing all the evidence taken upon the trial of this proceeding, is hereby settled, and ordered filed and annexed to the judgment-roll.

Dated May 25th, 1897.

GEO. B. ABBOTT, *Surrogate.*

108 At a term of the appellate division of the supreme court, held in and for the second judicial department at the city of Brooklyn, on the 22d day of June, 1897.

Present: Hon. William W. Goodrich, presiding justice; Hon. Edgar M. Cullen, Hon. George B. Bradley, Hon. Willard Bartlett, Hon. Edward W. Hatch, justices.

In the Matter of the Application for Letters of Administration of the Goods, Chattels, and Credits which were of EDWARD KIMBALL, Deceased, etc.

Order of Affirmance on Appeal from Surrogate.

Maude E. Kimball, the petitioner in this proceeding, having appealed to the appellate division of the supreme court from a decree of the surrogate's court of the county of Kings, made on the 8th day of March, 1897, ordering, adjudging and decreeing that the petitioner is not the widow of Edward C. Kimball, deceased, etc., and the said appeal having been argued by Mr. George Bell, of counsel for the appellant, and Mr. L. H. Arnold, of counsel for the respondent, and due deliberation having been had thereon, and the court having unanimously decided that the findings of fact by the surrogate are supported by the evidence,

109 It is hereby ordered and adjudged that the decree so appealed from be and the same is hereby affirmed, with costs.

Enter.

WM. W. GOODRICH, *P. J.*

At a surrogate's court, held in and for the county of Kings, at the surrogate's office, in the hall of records, on the 28th day of June, 1897.

Present: Hon. George B. Abbott, surrogate.

In the Matter of the Application for Letters of Administration of the Goods, Chattels, and Credits which were of EDWARD C. KIMBALL, Deceased, and for the Revocation of Letters Issued to HARRIET A. KIMBALL and JOHN S. JAMES on the 10th day of November, 1896.

Decree on Order of Affirmance.

An appeal having been taken by Maude E. Kimball to the appellate division of the supreme court from a decree made by this court herein on the 8th day of March, 1897, denying the application made by said Maude E. Kimball for the revocation of letters of administration heretofore and on the 10th day of November, 1896,

issued to Harriet A. Kimball and John S. James of the goods,
110 chattels and credits which were of Edward C. Kimball, deceased; and it appearing to this court from the remittitur from the appellate division of the supreme court, second department, that said appeal came duly on to be heard by said court, that said court unanimously decided that the findings by the surrogate were supported by the evidence, and that on the 22d day of June, 1897, said court made an order affirming said decree so appealed from, with costs;

And the costs of Harriet A. Kimball, Harriet I. James and John S. James, the respondents on said appeal, having been duly adjusted by the clerk of this court at ninety-eight $\frac{32}{100}$ dollars;

Now, on reading and filing the said remittitur from the appellate division of the supreme court, and on all the other papers and proceedings herein, on motion of Arnold & Greene, attorneys for said Harriet A. Kimball, Harriet I. James and John S. James, it is

Ordered, adjudged and decreed that Harriet A. Kimball, Harriet I. James and John S. James recover from said Maude E. Kimball the sum of ninety-eight $\frac{32}{100}$ dollars as and for their costs of the said appeal as taxed, and that they have execution against her therefor.

GEORGE B. ABBOTT, *Surrogate.*

110½ STATE OF NEW YORK, } ss:
County of Kings, }

I, Joseph W. Carroll, clerk of the surrogate's court in and for the said county of Kings, do hereby certify that I have compared the foregoing copy of the record of the proceedings in the surrogate's court, Kings county, upon which the surrogate acted in making the decree appealed from, together with the judgment entered by the surrogate, based on the order of the appellate division affirming the said surrogate's decree, with the original record thereof now remaining in this office, and have found the same to be a correct transcript therefrom, and of the whole of such original record.

In testimony whereof I have hereunto set my hand and affixed the seal of said surrogate's court this 11th day of October, in the year of our Lord one thousand eight hundred and ninety-seven.

[L. S.] JOSEPH W. CARROLL,
Clerk of the Surrogate's Court.

110¾ STATE OF NEW YORK, } ss:
County of Kings, }

I, Jacob Worth, clerk of the county of Kings, and clerk of the supreme court of the State of New York, in and for said county (said court being a court of record), do hereby certify that
[L. S.] I have compared the annexed with the original notice of appeal to the court of appeals filed in my office August 19, 1897, and that the same is a true transcript thereof and of the whole of such original.

In testimony whereof I have hereunto set my hand and affixed the seal of said county and court, this 11th day of October, 1897.

JACOB WORTH, *Clerk.*

111 Supreme Court, County of Kings.

In the Matter of the Application for Letters of Administration of the Goods, Chattels, and Credits which were of EDWARD C. KIMBALL, Deceased, and for the Revocation of the Letters Issued to HARRIET A. KIMBALL and JOHN S. JAMES on the 10th Day of November, 1896. MAUDE E. KIMBALL, Petitioner and Appellant.

Notice of Appeal.

Take notice that the above-named Maude E. Kimball, petitioner and appellant, hereby appeals to the court of appeals of the State of New York from the order made in the above-entitled matter by the appellate division of the supreme court in and for the second judicial department, and entered in the office of the clerk of the county of Kings, on the twenty-second day of June, 1897, affirming the decree of the surrogate's court of the county of Kings, entered in the above-entitled matter on the 8th day of March, 1897, with costs, and from each and every part of said order.

Dated August 19th, 1897.

WALDEGRAVE HARLOCK,
Attorney for Maude E. Kimball, Petitioner and Appellant.

To the clerk of the county of Kings, and to Arnold & Greene, Esqrs., attorneys for the respondents, Harriet A. Kimball, John S. James and Harriet I. James.

112 Supreme Court, Appellate Division, Second Department.

In the Matter of the Application for Letters of Administration of the Goods, Chattels, and Credits which were of EDWARD C. KIMBALL, Deceased, &c.

MAUDE E. KIMBALL, Appellant,
against
HARRIET A. KIMBALL, HARRIET I. JAMES, and JOHN S. JAMES, Respondents.

Opinion.

Appeal from a decree of the surrogate of Kings county denying an application for the revocation of letters of administration of the goods and credits of Edward C. Kimball, deceased.

George Bell, for appellant.
L. H. Arnold, for respondents.

GOODRICH, *P. J.*:

The intestate died, November 9, 1896. On the next day a petition was filed with the surrogate of Kings county by Harriet A. Kimball, his mother, alleging that the intestate was unmarried and left him surviving no widow. Whereupon, on the same day,
113 letters of administration were granted to her and John S. James, her son-in-law. The appellant, Maude E. Kimball,

on December 17, filed a petition to revoke these letters of administration, asking for the issue of letters to herself and alleging that she was the widow of the intestate, having been married to him in the city of Brooklyn on June 29, 1895, by Rev. W. C. P. Rhoades, pastor of the Marcy Ave. Baptist church; that she and the intestate lived together as husband and wife at Seacliff until September 7, when they went to housekeeping at 483 Decatur street, Brooklyn, and continued to live together until January 3, 1896, when the intestate went to Easton, Pennsylvania, to engage in business, and she returned to her mother's house owing to the failure of the intestate to support her; that she was introduced by the intestate as his wife and that visits were exchanged with Harriet A. Kimball.

The application was opposed by the mother and sister of the intestate on the ground that the petitioner was not the widow of the deceased. They admitted that a ceremony of marriage had taken place between her and the intestate, but alleged that the marriage was invalid because she had married on May 12, 1885, one James L. Semon, at the city of New York, and that in September, 1890, she instituted an action for divorce in the district court of the fifth judicial district of the State of North Dakota; that Semon was then and ever since a resident of this State; that an order was made directing the service of the summons by publication; that a copy of the same was served on Semon at the city of New York, and that he did not appear, answer or demur in the action; that these facts were recited in the final decree of divorce of January 26, 1891; that by reason of these facts the court did not acquire jurisdiction of Semon, and that the decree of divorce was absolutely null
114 and void in this State, so that the appellant could not lawfully contract marriage with the intestate, and that her alleged marriage with the intestate was null and void.

If these allegations were assumed to be true, we would have no difficulty in deciding this controversy. It was said, in Kamp *vs.* Kamp (59 N. Y., 212, 215), that "the general rule is that a party cannot appeal from one judge to another of co-ordinate jurisdiction, by motion for relief, from an order or judgment against him, but must seek his remedy by appeal to a tribunal having appellate jurisdiction in the premises. But the question has usually arisen in cases where the court making the order has had jurisdiction of the subject-matter and of the person of the party against whom the order or judgment has passed. The reason of the rule, which is simply one of convenience, does not apply when the court is entirely without jurisdiction, and the whole proceeding, including the order or judgment, is *coram non judice* and void. One is not bound to appeal from a void order or judgment, but may resist it and assert its invalidity at all times."

In The People *vs.* Baker (76 N. Y., 78, 82), the defendant was indicted for bigamy. It appeared that a decree of divorce had been obtained in an action in the court of common pleas in Ohio, where the record showed that the process had been served on the defendant by publication, and that there was no personal appearance by him in the action. This decree was regular and sufficient, and the

judgment binding under the laws of Ohio. Judge Folger, writing the opinion, said: "As we look at this case, it presents this question: Can a court, in another State, adjudge to be dissolved and at an end the matrimonial relation of a citizen of this State, domiciled and actually abiding here throughout the pendency of the
115 judicial proceedings there, without a voluntary appearance by him therein, and with no actual notice to him thereof, and without personal service of process on him in that State?" This question the court decided in the negative and affirmed the conviction of the defendant for bigamy, so that the question is no longer an open one in this State.

The question, however, is complicated by subsequent proceedings and an amendment *nunc pro tunc* of the decree of the North Dakota court. A few weeks after the issuing of the letters of administration, Mr. Semon filed a petition in that court, alleging that after service upon him of the process within the State of New York, which required the answer within thirty days, he did, on October 23, 1890, prepare and verify what he calls an answer to the complaint and served it by mail upon the plaintiff's attorneys in that action; that he did this without advice of counsel, and that it was his intention to inform the court of his position and defense and to submit himself to the jurisdiction of the court, and that he believed this course was sufficient and that his answer would be filed. Annexed to his petition was the paper referred to and an affidavit from one of the plaintiff's attorneys, admitting its receipt and stating that the same had been lost or destroyed and was never filed by them, because it was not in the form of a pleading according to the statutes of that State.

The court directed the filing of the defendant's letter as of the date when it was received by the plaintiff's attorneys, apparently, October 28, 1890, and ordered that the decree "be amended *nunc pro tunc* as of the 26th day of January, 1891, by striking out therefrom the recitals setting forth 'that the defendant failed to answer, demur or make any appearance whatever, as by the summons and the law required in such case, but instead thereof made default; that
116 upon such default,' and by inserting in lieu thereof the following words: 'The defendant having appeared herein and answered and submitted himself to the jurisdiction of the court.'"

The question presented for our consideration is whether the status of the petitioner is determined by the amendment of the decree *nunc pro tunc*, and whether the decree thus amended can be attacked on the ground that the court was without jurisdiction. The practice of North Dakota is generally similar to our own. Section 5341 of the Code of Dakota, which was made part of the law of North Dakota when that State was admitted to the Union, provides that it shall not be necessary to entitle an affidavit in an action, but an affidavit without a title or with a defective title shall be as effectual for every purpose as if it were duly entitled, if it intelligently refer to the action or proceeding in which it is made. Such also is the similar provision of section 728 of our own Code of Civil Procedure. To the letter of Semon was attached an affidavit dated October 23,

1890, which, although quite informal as a verification of a pleading, declared that the letter was "absolutely true in every particular." The district court of North Dakota held that it constituted a proper appearance and answer, ordered it to be filed as such and amended the decree *nunc pro tunc*, as already stated. The code of that State contains sections substantially similar to sections 723 and 724 of our own code, providing for the amendment, before or after judgment, of all papers and proceedings in furtherance of justice.

It is well settled law in this State that the recitals in a judgment that a defendant was served with process and appeared therein is not conclusive and does not preclude such defendant from showing
117 that in fact he was not served with process and did not appear, and that there is no distinction in these respects between the effect of domestic and foreign judgments (Ferguson *vs.* Crawford *et al.*, 70 N. Y., 253).

A similar question to the one here involved was under consideration in Kerr *vs.* Kerr (41 N. Y., 272). The surrogate of Kings county, in August, 1867, granted to the plaintiff, Jane Kerr, claiming to be the widow of Richard Kerr, letters of administration upon the estate of Richard. Subsequently, the defendant, Jane F. Kerr, applied for a revocation of the letters on the ground that she, and not Jane, was the widow. Jane answered that she had married Richard in February, 1867. It appeared that in July, 1866, and before his marriage with Jane, Richard had obtained a divorce from a former wife in an Indiana court, the decree reciting the appearance of the wife in the action. The surrogate decided and the court of appeals affirmed his decision, holding that the judgment might be inquired into and the fact shown that there was no such appearance, and that the Indiana court had not acquired jurisdiction. It will be observed that this attack was made upon the decree by a stranger and not by a party to it, and was permitted because property rights were affected by it.

The surrogate in this proceeding has found as a matter of fact that the appellant and Semon were married in New York on May 12, 1885; that ever since that marriage he was a resident of this State, and that the appellant commenced her action for divorce in North Dakota, but that her husband was not served with process in that action in said State and did not appear therein. He finds as a conclusion of law that the North Dakota court did not acquire jurisdiction of the husband and that when the appellant entered into the marriage ceremony with the intestate she was still the wife of Semon and could not contract a lawful marriage with the intestate, and therefore is not his widow.

118 It is not necessary for us to decide whether the rights of the intestate's next of kin can be affected by the amendment of the decree, made after his death. It is sufficient for us to say that we can see no reason for disturbing the findings and conclusions of the surrogate, for the reasons already stated. He was justified by the evidence in his decision. It is at least a very curious and suggestive coincidence that as soon as the validity of the appellant's divorce had been practically attacked by the granting of letters of

administration to the next of kin, the former husband of the appellant at once applied for an amendment of the decree which adjudged him guilty of moral obliquity in failing to discharge his marital obligations, not for the purpose of having it vacated and being relieved from the imputation which it carried, but to give life and force to the charges against himself, and for this purpose submit himself to the jurisdiction of the court and assent to the judgment. The story of his appearance and answer is apocryphal and challenges credulity, and the surrogate appears to have been of this opinion.

We see no reason to differ with his conclusion. The decree should be affirmed.

119 STATE OF NEW YORK, *ss:*

Court of Appeals.

Pleas in the court of appeals, held at the capitol, in the city of Albany, on the 4th day of February, in the year of our Lord one thousand eight hundred and ninety-eight, before the judges of said court.

Witness the Hon. Alton B. Parker, chief judge, presiding.

W. H. SHANKLAND, *Clerk.*

Remittitur February 4th, 1898.

In the Matter of the Application for Letters of Administration, etc., of EDWARD C. KIMBALL, Deceased, etc.

Be it remembered that on the 15th day of October, in the year of our Lord one thousand eight hundred and ninety-seven—

Maude E. Kimball, the appellant in this proceeding, came here into the court of appeals, by Waldegrave Harlock, her attorney, and filed in the said court a notice of appeal and return thereto from the order of the appellate division of the supreme court in and for the second judicial department, and Harriet A. Kimball and
120 others, the respondents in said proceeding, afterward appeared in said court of appeals, by Arnold and Greene, her attorneys; which said notice of appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon the said court of appeals, having heard this cause argued by Mr. Thomas Allison, of counsel for the appellant, and by Mr. L. H. Arnold, of counsel for the respondents, and after due deliberation had thereon, did order and adjudge that the order of the appellate division of the supreme court appealed from herein be, and the same hereby is, affirmed with costs.

And it was also further ordered that the record aforesaid and the proceedings in this court be remitted to the surrogate's court of the county of Kings, there to be proceeded upon according to law.

Therefore it is considered that the said order be affirmed with costs.

And thereupon as well *as* the notice of appeal and return thereto

aforesaid as the judgment of the court of appeals aforesaid, by them given in the premises, are by the said court of appeals remitted into the surrogate's court of the county of Kings, before the surrogate thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said surrogate's court before the surrogate thereof, &c.

W. H. SHANKLAND,
Clerk of the Court of Appeals of the State of New York.

121 Court of Appeals, Clerk's Office.

ALBANY, *February 4th*, 1898.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the court of appeals, with the papers originally filed therein attached thereto.

[SEAL.] W. H. SHANKLAND, *Clerk.*

122 At a surrogate's court, held in and for the county of Kings, at the surrogate's office, in the hall of records, in the borough of Brooklyn, city of New York, on the 7th day of February, 1898.

Present: Hon. George B. Abbott, surrogate.

In the Matter of the Application for Letters of Administration of the Goods, Chattels, and Credits which were of EDWARD C. KIMBALL, Deceased, and for the Revocation of Letters Issued to HARRIET A. KIMBALL and JOHN S. JAMES on the 10th Day of November, 1896.

An appeal having been taken by Maude E. Kimball, the petitioner herein, to the court of appeals from the order of the appellate division of the supreme court in and for the second judicial department, entered in the office of the clerk of the county of Kings on the 22nd day of June, 1897, affirming the decree of the surrogate's court of the county of Kings entered in the above-entitled matter on the 8th day of March, 1897, with costs:

Now, on reading and filing the remittitur of the court of appeals in the above-entitled matter, by which it appears that said order so appealed from was in all respects affirmed with costs, on motion of Arnold & Greene, attorneys for Harriet A. Kimball & others, the respondents on said appeal, it is—

Ordered, adjudged, and decreed that the order of the court of appeals in the above-entitled matter be, and the same hereby
123 is, made the order or decree of this court, and that said respondents have execution therefor.

GEO. B. ABBOTT, *Surrogate.*

A copy.

[SEAL.] JOSEPH W. CARROLL,
Clerk of the Surrogate's Court.

124 [Endorsed:] N. Y. surrogate's court, Kings county. In the matter of the application for letters of adm'n, &c., of Edward C. Kimball, deceased, and for revocation of letters, &c. (Copy.) Order filing remittitur. Arnold & Greene, attorneys for resp'd'ts, 3 Broad street, New York city. To W. Harlock, Esq., attorney for Maud E. Kimball, appellant.

SIR: Take notice that the within is a true copy of an order herein, which was this day duly entered and filed in the office of the clerk of the surrogate's court of the county of Kings, in the hall of records, in the city of New York, borough of Brooklyn.

Dated New York this 7th day of February, 1898.

Yours, &c., ARNOLD & GREENE,
Attorneys for Harriet A. Kimball, Respondent,
3 Broad Street, New York, N. Y.

To W. Harlock, Esq., attorney for Maud E. Kimball, appellant.

Rec'd Feb. 7, '98.
W. H.

125 Surrogate's Court, County of Kings.

In the Matter of the Application for Letters of Administration of the Goods, Chattels, and Credits which were of EDWARD C. KIMBALL, Deceased, and for the Revocation of Letters Issued to HARRIET A. KIMBALL and JOHN S. JAMES on the 10th Day of November, 1896.

An appeal having been taken by Maude E. Kimball, the petitioner herein, to the court of appeals from the order of the appellate division of the supreme court in and for the second judicial department, entered in the office of the clerk of the county of Kings on the 22nd day of June, 1897, affirming with costs the decree of the surrogate's court of the county of Kings entered in the above-entitled matter on the 8th day of March, 1897, and the said court of appeals having sent hither its remittitur filed herein on the 7th day of February, 1898, by which it appears that the said order so appealed from was in all respects affirmed with costs and has given judgment accordingly and has remitted the judgment of the said court of appeals to this court to be enforced according to law, and this court having, by an order entered herein the 7th day of February, 1898, ordered, adjudged, and decreed that the order of the court of appeals be made the order or decree of this court with costs, and the said costs having been adjusted by this court at the sum of $111.05:

Now, on motion of Arnold & Greene, attorneys for Harriet A. Kimball and others, respondents herein, it is—

126 Ordered, adjudged, and decreed that the order of the court of appeals in the above-entitled matter be, and the same hereby is, made the order or decree of this court, and that Harriet A. Kimball, Harriet I. James, and John S. James, the respondents on said appeal, do recover of Maude E. Kimball, the appellant on

said appeal, the sum of $111.05 as and for their costs and disbursements on the appeal to the court of appeals, and that they have execution therefor.

Dated February 9th, 1898.

GEO. B. ABBOTT, *Surrogate.*

(Certificate.)

127 [Endorsed:] Surrogate's court, Kings county. In the matter of the application for letters of administration of the goods, &c., of Edward C. Kimball, deceased, and for the revocation of letters, &c. (Copy.) Final decree. Arnold & Greene, attorneys for resp'd'ts, 3 Broad street, New York city. To W. Harlock, Esq., attorney for appellant.

SIR: Take notice that the within is a true copy of the final decree herein, which was this day duly entered and filed in the office of the clerk of the surrogate court of Kings county, in the hall of records, borough of Brooklyn, in the city of New York.

Dated New York this 10th day of February, 1898.

Yours, &c., ARNOLD & GREENE,
Attorneys for Respondents, 3 Broad Street, New York, N. Y.

To W. Harlock, Esq., attorney for appellant.

Rec'd Feb. 10, '98.
W. H.

128 UNITED STATES OF AMERICA, *ss:*

Seal of the Supreme Court of the United States.

The President of the United States of America to the honorable the surrogate of the county of Kings, in the State of New York, and to the surrogate court of the said county of Kings, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said surrogate court on a remittitur from the court of appeals of the State of New York, before you, being the highest court of law or equity of the said State in which a decision could be had in the said suit or proceeding entitled "In the matter of the application for letters of administration of the goods, chattels, and credits which were of Edward C. Kimball, deceased, and for the revocation of the letters issued to Harriet A. Kimball and John S. James on the 10th day of November, 1896," in which proceeding one Maude E. Kimball was the petitioner and Harriet A. Kimball, John S. James, and Harriett I. James were the respondents, being all the parties to said suit or proceeding, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in

favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or
129 statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Maude E. Kimball, as by her complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 16th day of February, in the year of our Lord one thousand eight hundred and ninety-eight.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
DAVID J. BREWER,
Associate Justice Sup. Ct. U. S.

130 [Endorsed:] Writ of error. W. Harlock, attorney for Maude E. Kimball, the within-named petitioner and plaintiff in error, 20 Nassau St., New York city, N. Y.

131 Supreme Court of the United States.

In the Matter of the Application for Letters of Administration of the Goods, Chattels, and Credits which were of EDWARD C. KIMBALL, Deceased, and for the Revocation of the Letters Issued to HARRIET A. KIMBALL and JOHN S. JAMES on the 10th Day of November, 1896. MAUDE E. KIMBALL, Petitioner.

Bond for Damages and Costs.

Know all men by these presents that we, Maude E. Kimball, William McKee, and Sarah C. McKee, each residing at No. 1170 Dean street, in the city of Brooklyn, county of Kings, and State of New York, are held and firmly bound unto the above-named Harriet A. and Harriet I. James
Kimball and John S. James ᴀ in the sum of four hundred
C. J. S. dollars, to be paid to the said Harriet A. Kimball and and Harriet I. James
John S. James ᴀ for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our

heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the fifteenth day of February, in the year of our Lord one thousand eight hundred and ninety-eight.

Whereas the above-named Maude E. Kimball has prosecuted a writ of error to the Supreme Court of the United States to reverse the final decree rendered in the above-entitled proceeding by the surrogate's court of Kings county, in the State of New York, on a remittitur from the court of appeals of the State of New York:

Now, therefore, the condition of this obligation is such
132 that if the above-named Maude E. Kimball shall prosecute said writ of error to effect and answer all damages and costs if she fail to make said writ of error good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

MAUDE E. KIMBALL. [SEAL.]
WILLIAM McKEE. [SEAL.]
SARAH C. McKEE. [SEAL.]

Sealed and delivered and taken and acknowledged this 15th day of February, 1898, before me, at Brooklyn, N. Y.

CHAS. J. SANDS,
[SEAL.] *Notary Public, Kings County, N. Y.*

Approved by—
(Signed) DAVID J. BREWER,
Associate Justice Sup. Ct. U. S.
Feb'y 16th, '98.

UNITED STATES OF AMERICA, }
State of New York, County of Kings, } *ss:*

William McKee, being duly sworn, deposes and says that he is a resident and freeholder within the State of New York, and that he is worth more than the sum of five thousand dollars over and above all his just debts and liabilities and exclusive of property exempt by law from levy and sale under an execution.

WILLIAM McKEE.

Sworn to before me this 15th day of February, 1898.

CHAS. J. SANDS,
[SEAL.] *Notary Public, Kings County, N. Y.*

133 UNITED STATES OF AMERICA, }
State of New York, County of Kings, } *ss:*

Sarah C. McKee, being duly sworn, deposes and says that she is a resident and freeholder within the State of New York, and that she is worth more than the sum of five thousand dollars over and above all her just debts and liabilities and exclusive of property exempt by law from levy and sale under an execution.

SARAH C. McKEE.

Sworn to before me this 15th day of February, 1898.

CHAS. J. SANDS,

[SEAL.] *Notary Public, Kings County, N. Y.*

134 [Endorsed:] Supreme Court of the United States. In the matter of the application for letters of administration of the goods, chattels, and credits which were of Edward C. Kimball, deceased, and for the revocation of the letters issued to Harriet A. Kimball and John S. James on the 10th day of November, 1896. Maude E. Kimball, petitioner. Copy. Bond for damages and costs on writ of error.

135 Supreme Court of the United States.

MAUDE E. KIMBALL, Plaintiff in Error,
against
HARRIET A. KIMBALL, JOHN S. JAMES, and HARRIET I. JAMES, Defendants in Error. } Assignment of Errors.

Afterwards, to wit, on the 16th day of February, 1898, at the October term for 1897 of the Supreme Court of the United States, at the Capitol, in the city of Washington and District of Columbia, comes Maude E. Kimball, by Waldegrave Harlock, her attorney, and says that in the record and proceedings in the above-entitled matter there is manifest error in this, to wit:

I. That the decree of divorce granted to Maude E. Semon, now Maude E. Kimball, by the district court of the fifth judicial district of the State of North Dakota, dated the 26th day of January, 1891, in the action of Maude E. Semon, plaintiff, *vs.* James L. Semon, defendant, dissolving the bonds of matrimony between said Maude E. Semon and James L. Semon, was a good and valid decree and was not void.

II. That the said decree of divorce granted by the district court of the fifth judicial district of the State of North Dakota, dated January 26th, 1891, dissolving the bonds of matrimony between James L. Semon and said Maude E. Kimball, therein called Maude
136 E. Semon, was, prior to the amendment thereof and as and in the form and manner in which said decree was originally made, signed, entered, and docketed, a good and valid decree, and was not void, and was binding upon the parties to this proceeding, and that the said surrogate's court and other aforesaid courts in the State of New York erred in not so holding and in not making a decree herein accordingly.

III. That the decree of divorce granted by the district court of the fifth judicial district of the State of North Dakota, dated January 26th, 1891, dissolving the bonds of matrimony between James L. Semon and said Maude E. Kimball, in said decree called Maude E. Semon, as amended *nunc pro tunc* as of the date of its original entry, was a good and valid decree, and the order of said court, directing said amendment, dated December 16, 1896, was a good and valid order, and the same were not, nor was either of the same, void, and

that the said surrogate's court and said other courts in the State of New York erred in not so holding and in not making a decree herein accordingly.

IV. That the recital and finding in said decree of the said district court of the fifth judicial district of the State of North Dakota that James L. Semon, the defendant in the divorce action, appeared and answered in said action and submitted himself to the jurisdiction of said court was an adjudication duly made by said court, and that full faith and credit to such adjudication should have been, but were not, given by the aforesaid courts in the State of New
137 York in this suit or proceeding and in the final order or decree herein, pursuant to the Constitution of the United States and the acts of Congress as aforesaid.

V. That by the force and effect of said decree said Maude E. Semon, now Maude E. Kimball, was not the wife of James L. Semon when she married Edward C. Kimball, and by such marriage she became the lawful wife of Edward C. Kimball, and upon the decease of said Kimball she became his lawful widow.

VI. That in violation of section I of article IV of the Constitution of the United States and of the acts of Congress relating to the proof and effect of the judicial proceedings of one State in other States, the courts in the State of New York, to wit, the surrogate's court of the county of Kings, in said State, the appellate division of the supreme court of said State, in the second judicial department, and the court of appeals of said State, in the suit or proceeding at bar and in the final order or decree therein did not give full faith and credit to the said decree of divorce nor to said order amending the same, nor to the record and judicial proceedings of the State of North Dakota in the aforesaid action of Maude E. Semon *versus* James L. Semon, in which said decree of divorce and order were made.

Wherefore the said Maude E. Kimball prays that the decree herein of the surrogate's court of the county of Kings, in the State of New York, on the remittitur of the court of appeals of the
138 State of New York, be reversed and the said surrogate's court be ordered to grant the prayer of the petitioner, Maude E. Kimball, contained in her petition herein, dated December 17th, 1896.

Dated February 16th, 1898.

W. HARLOCK,
Attorney for Plaintiff in Error.

139 [Endorsed:] Supreme Court of the United States. Maude E. Kimball, plaintiff in error, against Harriet A. Kimball, John S. James, and Harriet I. James, defendants in error. Original. Assignment of errors. W. Harlock, attorney for plaintiff in error, 20 Nassau street, New York, N. Y.

140 UNITED STATES OF AMERICA, *ss:*

To Harriet A. Kimball, John S. James, and Harriet I. James, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the surrogate's court of the county of Kings, in the State of New York, wherein Maude E. Kimball is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable David J. Brewer, associate justice of the Supreme Court of the United States, this 16th day of February, in the year of our Lord one thousand eight hundred and ninety-eight.

DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

141 [Endorsed:] Citation on writ of error.

On this 18th day of February, in the year of our Lord one thousand eight hundred and ninety-eight, personally appeared Rudolph H. Ehrsam before me, the subscriber, a notary public in and for the county of Kings, State of New York, duly commissioned and sworn, and makes oath that he delivered a true copy of the within citation to Arnold and Greene, the attorneys for the defendants in error, on the 17th day of February, 1898, at their office, in the city of New York, by delivering the same to Lemuel H. Arnold, one of said attorneys for said defendants in error, in person, at said office, and leaving the same with him.

RUDOLPH H. EHRSAM.

Sworn to and subscribed the 18th day of February, A. D. 1898.

JOS. W. DUFFY,
Notary Public, Kings County, New York.

142 STATE OF NEW YORK, *County of Kings,* } *ss:*

I, Joseph W. Carroll, clerk of the surrogate's court in and for the said county of Kings, do hereby certify that the foregoing is a full, true, and complete record of all proceedings had in the surrogate's court, Kings county, New York, "in the matter of the application for letters of administration of the goods, chattels, and credits which were of Edward C. Kimball, deceased."

In testimony whereof I have hereunto set my hand and affixed the seal of said surrogate's court this 18th day of February, in the year of our Lord one thousand eight hundred and ninety-eight.

[Kings County Surrogate Seal.]

JOSEPH W. CARROLL,
Clerk of the Surrogate's Court.

143 In the Matter of the Application for Letters of Administration of the Goods, Chattels, and Credits which were of EDWARD C. KIMBALL, Deceased.

(Decided February 4, 1898.)

Appeal by Maude E. Kimball from an order of the appellate division, second department, affirming a decree of the surrogate's court of Kings county denying her petition for the removal of Harriet A. Kimball and John S. James, as executrix and executor, and for the appointment of herself as executrix in their place and stead, of the goods, chattels, and credits which were of Edward C. Kimball, deceased.

Thomas Allison and W. Harlock, for appellant.
Arnold & Greene, for respondents.

HAIGHT, *J.:*

Edward C. Kimball died in the city of Brooklyn on the 9th day of November, 1896, intestate, leaving him surviving Harriet A. Kimball, his mother, and Harriet I. Kimball, his sister, as his only next of kin and heirs-at-law. On the 10th day of November letters of administration were issued upon his estate by the surrogate of Kings county to Harriet A. Kimball and John S. James. On the 17th day of December thereafter, one Maude E. Kimball, claiming to be the widow of the deceased, filed a petition with the surrogate praying for the revocation of the letters of administration issued to Harriet A. Kimball and John S. James and for the appointment of herself in their place and stead. It appears that she was married on the 12th day of May, 1885, to one James L. Semon, in the city of New York, and that they resided together as husband and wife for a number of years, during which time two children were born to them; that in the month of June, 1890, she left her husband in the city of New York and removed to the State of North Dakota where she took up her residence, and after remaining in that State for a period of ninety days, instituted an action in the district court of the fifth judicial district of that State for a divorce. She procured the summons to be served upon Semon in the city of New York where he still continued and ever since has resided. The summons required him to appear and answer the complaint within thirty days after the service, and in default of so doing, the plaintiff would apply to the court for the relief demanded in the complaint. On the 31st day of December thereafter, the plaintiff's attorney made an affidavit to the effect that more than thirty days had elapsed since the service of the summons was made upon the defendant, and that no answer or demurrer to the complaint in the action had been received by him, and that the said defendant had not made, served or filed any appearance in any manner in the action. Upon this affidavit an application was made to the court for the appointment of a referee to take proof as to the facts alleged in the complaint, and upon the report subsequently made by the referee, judgment was entered annulling the marriage

and granting her a divorce. About the 5th day of February, 1891, she returned to the city of New York, and on the 29th
144 day of June, 1895, was married to Edward C. Kimball in the city of Brooklyn. They thereafter lived together until about the 3d day of January, 1896, when Kimball left her and went to Easton, Pa., to engage in business. He died, as we have seen, the following November. Kimball knew at the time of his marriage that the petitioner was a divorced woman, but he had no knowledge of the means by which such divorce had been obtained and did not know that it was invalid. After his death and in December, 1896, Semon, the former husband of the petitioner, applied to the Dakota court which granted the decree of divorce to have a letter which he sent to the plaintiff's attorney, filed in the court as his answer in the divorce suit *nunc pro tunc* as of the date of its receipt by the plaintiff's attorney, and to have the decree of divorce, made on the 26th day of January, 1891, amended *nunc pro tunc* as of that date, by striking out the recital to the effect that the "defendant had failed to answer, demur or make appearance in the action," and by inserting in place thereof the words, "The defendant having appeared herein and answered and submitted himself to the jurisdiction of the court." Notice of this application was given to the plaintiff's attorney who appeared in the divorce suit, but no notice was given to the personal representatives of the deceased. No one appearing to oppose, the motion was granted by the court and the judgment was amended *nunc pro tunc* as prayed for.

It is now contended that the judgment of the Dakota court, awarding to the petitioner a divorce from her former husband, is valid and binding upon the parties, and that by reason thereof she had a lawful right to marry Kimball, and that, as his widow, she is entitled to letters of administration upon his estate and to share in the proceeds thereof.

The provision of the Constitution of the United States, which declares that full faith and credit shall be given in each State to the judicial proceedings of every other State; and the acts of Congress, which declare that the judgments of the State courts shall have the same faith and credit in other States as they have in the State where they were rendered, have repeatedly been held not to prevent an inquiry into the jurisdiction of the court in which the original judgment was rendered, nor into the rights of the State to exercise authority over the parties or subject-matter, nor an inquiry whether the judgment is founded on or impeachable for fraud; and that such a judgment may be inquired into, although the record states facts which would give the court jurisdiction. It is equally well settled that the judgment of a court of a sister State has no binding effect in this State, unless the court had jurisdiction of the subject-matter and of the person of the parties, and that want of jurisdiction may always be interposed against a judgment when it is sought to be enforced, or when any benefit is claimed for or under it. (Burdan *v.* Fitch, 15 Johns. 121; Andrews *v.* Montgomery, 19 Johns. 162; Shumway *v.* Stillman, 3 Cow. 372; Kerr *v.* Kerr, 41 N. Y. 272.)

145 It will not be claimed that the judgment as originally entered was valid. It recited the service of the summons outside of the State; that the defendant had not answered, demurred, or in any manner appeared in the action. The defendant was a resident of this State, and the courts of Dakota had never acquired jurisdiction of his person so as to have the power to order a judgment *in personam* against him. It is only upon the theory that he served an answer in that case, thereby submitting himself to the jurisdiction of that court, that it can be claimed that the courts of that State acquired jurisdiction to grant a final judgment against him. As we have seen, the plaintiff's attorney in that action made an affidavit upon which the judgment was entered, in which he stated that the defendant had not appeared, and had not answered or demurred. It is now claimed, however, that he had forwarded to the plaintiff's attorney a letter, of which the following is a copy:

"NEW YORK, *Oct.* 23, '90.

"Mr. Herman Winterer.

"DEAR SIR: In reply to the contents of paper served on me Oct. 15, 1890, by your representative, relative to my wife and children, I would say that my (wife) has sworn to matters untrue. For instance, this matter of desertion, this is surprising to me, as my wife personally ordered me from the house and stated that she never wished to see me again; this was the fore part of September, 1888. I did as I was ordered, having no alternative, as I was living under her mother's roof. Now is it at all likely that a domesticated man (as my wife will tell you I was) would give up a good home, without good reasons for so doing? It was only a short time after I left the house that they moved and took up another dwelling place, I never receiving any notification where I could see my children. I have meditated over this matter more than once, and have often wondered why it was done. It is now over a year ago since I saw my children last.

"In relation to my not providing for her, I would say that I have always given what I had, and very often more than I could afford. I am now carrying on the painting business, which was left to me by my father, who is now dead. When I came into possession of the business it was very much in debt. I have been trying ever since I took it to wipe out this burden, but as yet have not fully accomplished my aim and desire. There were times when I was not doing very much in my business, and consequently could not provide as promptly as I would like to. My wife swearing that I did not provide for her the common necessaries of life simply tells an untruth. As to my drinking habits, I will admit that I have indulged a little too much at times, but now have got bravely over that, having not tasted it in over a year. As the father of my children, I was glad to hear of their existence, and hope in the near future of having the pleasure of seeing my own flesh and blood.

"Very respectfully, JAS. L. SEMON,
"803 9 *Ave. N. Y. C.*

146 "CITY AND COUNTY OF NEW YORK, *ss:*

"Jas. L. Semon, being duly sworn, deposes and says that he is the writer of the foregoing letter, that he knows the contents thereof, and that it is absolutely true in every particular.

"JAS. L. SEMON. [L. S.]

"Subscribed and sworn to before me this 23d day of October, 1890.

"[L. S.] JAS. T. CLARK,
"*Notary Public for Co. of N. Y.*"

Is this letter an appearance in the case or an answer to the plaintiff's complaint? Under the Compiled Laws of the State of North Dakota it is provided by section 4914 that "the answer of the defendant must contain, first, a general or specific denial of each material allegation of the complaint controverted by the defendant or of any knowledge or information thereof sufficient to form a belief." Section 4921 provides that "every pleading in a court of record must be subscribed by the party or his attorney, and when any pleading is verified, every subsequent pleading, except a demurrer, must be verified also." By referring to the paper which is now claimed to be an answer, we find it dated at New York and addressed to the plaintiff's counsel individually. It is in form an ordinary letter commencing "Dear Sir" and closing with the words "Very respectfully" and is signed "Jas. L. Semon." It is not entitled in any action in any court of any State. It does not purport to be a pleading in any action. It contains no specific denials of the allegations of the complaint which for a moment could be held to frame an issue requiring a trial. It is verified, but not in the form required by the statute. Semon nowhere swears that he is the defendant in the action or the person that was required to answer the complaint. This is the evidence upon which the surrogate was required to determine the validity of the judgment. Upon this evidence he found, as a fact, that the defendant did not appear in the action in person or by attorney. This finding has been affirmed by the unanimous judgment of the appellate division and under the provisions of our constitution "No unanimous decision of the appellate division of the supreme court that there is evidence supporting or tending to sustain a finding of fact * * * shall be reviewed by the court of appeals." (Const. art. VI, § 9.) It is claimed, however, that this finding should be regarded as a conclusion of law and not as a determination of a question of fact. If we should so treat it we should not hesitate in sustaining the surrogate. The paper alluded to as an appearance or answer in the action could not be sustained in case it was assailed by a party. The plaintiff's attorney, anxious as he doubtless was to obtain jurisdiction of the defendant, never once thought of the letter as an answer, as is apparent from his affidavit of regularity upon which judgment was entered, and we cannot believe that it would have been received by the Dakota court and made the basis of amending

the judgment had it not been by the consent of the parties.
147 We then have a judgment of a court of a sister State entered against a resident of this State, in which there has been no personal service of process upon him in the jurisdiction of that State or appearance by him in the action by which the courts could acquire jurisdiction of his person. Such a judgment is void and of no force or effect in this State. (Kerr *v.* Kerr, 41 N. Y. 472; Baker *v.* Baker, 76 N. Y. 78; O'Dea *v.* O'Dea, 101 N. Y. 23; Jones *v.* Jones, 108 N. Y. 415; Cross *v.* Cross, 108 N. Y. 628; De Meli *v.* De Meli, 120 N. Y. 485, 495; Williams *v.* Williams, 130 N. Y. 193, 199.)

The order appealed from should be affirmed, with costs.

PARKER, *Ch. J.* (dissenting):

The command of the Constitution of the United States, that "full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State," seems to call for a reversal of the order appealed from.

The order affirms the decision of the surrogate of Kings county, declaring, among other things, that a certain decree of divorce made by a court of general jurisdiction in the State of North Dakota was and is a nullity, the reason assigned being that the court did not acquire jurisdiction of the defendant therein, James L. Semon. The provision of the Constitution quoted, said this court many years ago, means that the decree of a sister State, "must have the same faith and credit as it has in the State where it was rendered." (Kinnier *v.* Kinnier, 45 N. Y. 535.) It must, however, be a judgment, and the parties and subject-matter must have been within the jurisdiction of the court; and it is open to attack collaterally as to the question of jurisdiction, as in Kerr *v.* Kerr (41 N. Y. 272) where a decree of the court in the State of Ohio recited an appearance of the defendant by a firm of attorneys, and the person for whom such appearance was noted was permitted to prove that she had no knowledge whatever of the proceeding, and that she neither appeared nor authorized any one to appear for her.

Semon, the defendant in the action that culminated in the judgment which is declared a nullity by the court below, was not a resident of the State of North Dakota, but was a resident of New York, and unless he submitted himself to the jurisdiction of the court of North Dakota by an appearance in the action the judgment of divorce was a nullity. (O'Dea *v.* O'Dea, 101 N. Y. 23.)

The record presents an amended decree in that action which was in existence at the time these proceedings were instituted, and upon the subject of the defendant's appearance the recital therein is as follows: "The defendant having appeared herein and answered and submitted himself to the jurisdiction of the court." When this amended decree was put in evidence, therefore, it was established presumptively that the court making the decree had acquired jurisdiction over the defendant by his appearance therein. It was a presumption rebuttable by proper evidence, if such existed, but
148 in the absence of evidence tending to disprove the assertion of the decree that the defendant had appeared and answered and

submitted himself to the jurisdiction of the court, it was conclusive. It was not attacked by evidence; indeed, there was no evidence in the surrogate's court upon the subject except the papers which were submitted to the Dakota court on the motion made by the defendant Semon to amend the decree in respect to the recital referred to. If the judgment, when first entered, had been in the form in which it now is, as respects the recital, no one would have thought of challenging it, certainly not without direct evidence in possession of the attacking party tending to show that there was no appearance. But the motion to amend the judgment, made by the defendant in that action after the death of the intestate, Kimball, seems to have aroused suspicion that there was some collusion between Semon and his former wife and that his action was taken for her benefit, and not for his own, as he swears. There is, however, no proof that this suspicion is well founded, but if it were otherwise it could not affect the question before us, which is whether the Dakota court had before it competent evidence upon which to base the determination that it had jurisdiction of the defendant Semon at the time of the entry of the judgment, and authority to amend the decree as of that date, so that it should show such jurisdiction. The evidence upon which the court based its decision allowing the amendment is before us, and it cannot be said that it does not furnish support for the determination of the court.

The defendant Semon, who undertook to answer in that action within the time mentioned in the summons and subsequently insisted upon such an amendment of the decree as should recite the fact of his submission to the jurisdiction of the court, does not challenge its jurisdiction. That is attempted by a third party, who produces no other evidence than that submitted by Semon to the court in his petition praying for such an amendment as should recite the jurisdictional facts which existed when the decree was first made. No prior case can be found where it has been held that in such a situation an adjudication of personal appearance can be disregarded, when collaterally attacked by a third party, and the court, of its own head, hold otherwise.

The judgment of divorce was filed January 29th, 1891, and it recited that the defendant Semon had "failed to answer, demur or to make any appearance whatever as by the summons and the law required in such case, but instead thereof made default." If the decree were still in this form the right of the courts in this State to treat it as a nullity would be unquestioned. But about December 1st, 1896, the defendant in that action presented a petition to the court in which he stated, among other things, that eight days after the summons was handed to him in the city of New York, to wit, the 23d of October, 1890, he had prepared his answer to the charges alleged against him in the complaint in the action; had verified it before a notary public in the city of New York; that
149 it was prepared without the aid or advice of an attorney-at-law, in order to avoid the expense thereof, and that he had mailed it to the attorneys for the plaintiff. He asserts that it was his intention by this answer to inform the court of his position and

defense, and to submit himself to the jurisdiction of the court, and that he then believed such course to be sufficient and that his answer would be filed. Annexed to his petition, and made to form a part thereof, was a copy of the paper referred to and also an affidavit from one of the plaintiff's attorneys, admitting that he had received a letter of which the annexed was a copy, but asserting that it had been lost or destroyed, his omission to file it being due to the fact that it was not in the form of a pleading according to the statutes of that State.

Upon this petition and the papers annexed thereto an order was issued requiring the plaintiff in that action to show cause why the decree should not be amended *nunc pro tunc* as of January 26th, 1891, by striking therefrom the recitals to the effect that the defendant had failed to answer, demur or make any appearance whatever, and inserting therein the words, "the defendant having appeared herein and answered and submitted himself to the jurisdiction of the court."

The practice of North Dakota is similar to our own. Section 5341 of the Code provides that it shall not be necessary to entitle an affidavit in an action, but an affidavit without a title or with a defective title shall be as effectual for every purpose as if it were duly entitled, if it intelligently refer to the action or proceeding in which it was made; this provision is similar to section 728 of our Code of Civil Procedure.

The letter which Semon insists was his answer and so intended, was verified, not in the precise form provided by our statute for the verification of pleadings, but nevertheless it declared that it was "absolutely true in every particular." The district court of North Dakota held that it constituted a proper appearance and answer, ordered it to be filed as such and amended the decree *nunc pro tunc*, so as to recite the appearance of the defendant. The authority to grant the amendment was conferred by section 4938 of the Code of North Dakota, which provides that "the court may before or after judgment, in furtherance of justice, on such terms as may be proper, amend any pleading, process or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party or a mistake in any other respect, or by inserting other allegations material to the case, or when the amendment does not change substantially the claim or defense by conforming the pleading or proceeding to the facts proved." It will be observed that this section is substantially in the language of section 723 of our Code of Civil Procedure.

In granting the order to amend the decree *nunc pro tunc* upon the motion of the defendant in the action, the court necessarily decided what the evidence before it asserted, viz., that the jurisdictional facts existed at the time the original decree was
150 entered. The motion papers tend to show that such was the fact. It was not then disputed, nor has it since been questioned by evidence. The court having reached the conclusion that the recital in the original decree did not state the truth, but was a mistake, had the authority to amend the decree as of the date when

it was first entered so that it should recite the appearance of the defendant. Authority to do so was expressly conferred upon it by the Dakota statute, which, as we have already observed, is substantially the same as our own.

Upon the facts stated would any one question the power of a court of original jurisdiction in this State to grant such an amendment? If granted, would the suggestion be entertained that the judgment could be attacked collaterally without other evidence than that upon which the court based its determination? Certainly not. And it should not be forgotten that it is our duty to give the same force and effect to this determination of our sister State that we would give to it were it made by our own courts.

It is suggested that the learned surrogate's court found as a fact that there was no appearance by the defendant Semon in that action and that we are concluded by his finding. The surrogate found the facts to which I have already referred, and because he saw fit to insert among his findings of fact his conclusion of law that the defendant did not appear, does not deny to us the right, nor relieve us from the duty, of determining what conclusion of law the facts really demanded.

I advise a reversal of the order.

All concur with Haight, J., for affirmance (Martin, J., in result, on the ground that the question whether the defendant appeared in the action for divorce and submitted himself to the jurisdiction of the Dakota court was, under the evidence, a question of fact, and the finding of the surrogate cannot be reviewed by this court), except Parker, ch. J., who writes dissenting opinion.

Order affirmed.

A copy.

E. H. SMITH, *Reporter C.*

[Endorsed:] *In re* Kimball. Haight, J., Parker, ch. J. (dissenting).

Endorsed on cover: Case No. 16,807. New York, Kings county, surrogate's court. Term No., 594. Maude E. Kimball, plaintiff in error, *vs.* Harriet A. Kimball, John S. James, and Harriet I. James. Filed February 21st, 1898.

Sup. 248.

Brief of Harlock for P. E. (or

No. 594.

Filed April 9, 1898.

Supreme Court of the United States.

MAUDE E. KIMBALL,
Plaintiff in Error,

vs.

HARRIET A. KIMBALL, JOHN S. JAMES AND HARRIET I. JAMES,
Defendants in Error.

Brief for Plaintiff in Error in Opposition to Motion to Dismiss Writ of Error, and Papers in Opposition to said Motion.

WALDEGRAVE HARLOCK,
Attorney for Plaintiff in Error,
20 NASSAU STREET,
NEW YORK, N. Y.

WALDEGRAVE HARLOCK,
GEORGE BELL,
Of Counsel.

In the Supreme Court of the United States.

MAUDE E. KIMBALL, Plaintiff in Error, *against* HARRIET A. KIMBALL, HARRIET I. JAMES and JOHN S. JAMES, Defendants in Error.	No. 594.

BRIEF FOR PLAINTIFF IN ERROR IN OPPOSITION TO MOTION TO DISMISS WRIT OF ERROR.

On November 9, 1896, one Edward C. Kimball died in the City of Brooklyn, County of Kings and State of New York.

On the 10th day of November, 1896, Harriet A. Kimball, defendant in error, mother of the decedent, applied to the Surrogate of said County of Kings for letters of administration upon the estate of the decedent, she alleging that he died intestate, and that he was unmarried and left him surviving no widow. Thereupon the Surrogate issued letters of administration upon the decedent's estate to said Harriet A. Kimball, mother of decedent, and to one John S. James. Thereafter the plaintiff in error brought a proceeding by petition to said Surrogate to revoke said letters of administration, and to obtain such letters for herself on the ground that she was the lawful widow of decedent. The defendants in error appeared and opposed this application of plaintiff in error, alleging that she was not the widow of decedent, because she had married one John L. Semon before the ceremony of mar-

riage between her and the decedent, and that although a decree of divorce had been granted to her by a Court of the State of North Dakota five years before such ceremony of marriage with decedent, the said decree was void because the said Semon was a resident of the State of New York, and was not served with process in the State of North Dakota, and did not appear in the action, and that the decree of the North Dakota Court recited that the same was granted upon the default of said Semon. (See Printed Record, p. 12.)

To this the plaintiff in error responded by showing that before she began the proceeding to vacate the letters of administration and to obtain such letters for herself as widow, the Court of North Dakota had duly amended its decree in the divorce action *nunc pro tunc* as of the date of the original decree, by striking therefrom the recital that the defendant Semon had not appeared or answered therein, and by reciting in lieu thereof that the said Semon had duly appeared and answered and submitted himself to the jurisdiction of the Court. (See Printed Record, p. 28.)

A trial of the issues thus joined was had before the Surrogate and substantially all that was introduced in evidence by both sides was the record of the North Dakota action. (See Printed Record, p. 45.)

By that record it appeared that the amendment *nunc pro tunc*, as aforesaid (see pp. 32 and 41, Printed Record), was granted by the North Dakota Court upon proof that immediately after service upon him in New York of the summons and complaint in the divorce action said Semon sent to the plaintiff's attorneys therein a paper signed and sworn to by him controverting *seriatim* the allegations of the complaint, a copy of which paper was produced. (See pages 36, 39, Printed Record.) That this paper was so sent was in no wise controverted in this proceeding or elsewhere.

The Surrogate found, in direct conflict with the judgment of the North Dakota Court, that the paper so sent

did not constitute an appearance or answer, and he placed among his findings of fact a finding that the said Semon did not appear in the action, and he held the North Dakota decree void for such non-appearance and, therefore, the plaintiff in error was not legally divorced from the said Semon at the time of the ceremony of marriage between her and the decedent. The Surrogate thereupon made a final decree declaring that plaintiff in error was not the widow of decedent and not entitled to letters of administration upon his estate. (See Printed Record, pp. 57, 58.) The statutes of New York give to the widow of an intestate the absolute right to letters of administration upon the personal estate of her deceased husband. Appeals were prosecuted from the decree through the State Courts, where the decree was in each instance affirmed, whereupon plaintiff in error sued out a writ of error which it is now sought by the defendants in error to dismiss by reason of certain matters not appearing in the record, but for the first time called to the attention of any Court by the papers on this motion. These matters are as follows:

After this decree was entered an alleged will of the decedent was found, and the same was admitted to probate in exactly the same manner as were the letters of administration aforesaid granted, to wit, upon a petition filed by two of the defendants in error in which they alleged, as before, that the decedent left him surviving no widow. The statutes of New York prescribe that citation *must be issued to the widow of a decedent* upon an application to probate an instrument propounded as his last will and testament.

Upon learning of these proceedings upon probate, had without notice to plaintiff in error, counsel for plaintiff in error suggested to counsel for defendants in error the propriety of vacating by consent the decree of the Surrogate aforesaid adjudging plaintiff in error not to be the widow of the decedent so that some other action, suit or proceeding might be brought to test the question of widowhood without the danger to plaintiff in error of having

the decree aforesaid used against her as *res adjudicata* and as forever settling the question of her widowhood. Counsel for defendant in error, however, refused to consent to vacate said decree. They, of their own motion and *ex parte*, had caused to be revoked the letters of administration issued to the defendants in error, but would go no further (see Affidavit of W. Harlock, p. 32 of this Brief).

Plaintiff in error was therefore compelled to appeal in order to get rid of the adjudication that she was not the widow. And thereupon counsel for defendants in error suggested to counsel for plaintiff in error that a motion would be made to dismiss the appeal on the ground of the discovery and probate of a will and the consequent effect upon proceedings for letters of administration; but, after hearing the views of counsel for plaintiff in error as to the effect of the Surrogate's decree upon the question of widowhood in any other suit or proceeding which might be brought, counsel for defendants in error refrained from making such motion and the appeal was heard on its merits. (See affidavit of W. Harlock, p. 32 of this Brief.) The Surrogate's decree was affirmed on appeal both by the Supreme Court and the Court of Appeals of New York and judgments of affirmance and for costs amounting to two hundred and nine and 37/100 dollars have been entered against the plaintiff in error therein. (See Printed Record, pp. 67, 68 and 75).

No motion to dismiss was made in any of the State Courts, although ample opportunities therefor existed, and no suggestion of the facts now relied on to dismiss the writ of error was made therein.

The estate of the decedent consists of real estate in which plaintiff in error claims dower and also in a small amount of personal property, part of the proceeds of which under the laws of New York goes to the plaintiff in error if she is adjudged to be the widow of the decedent. But the principal object of the parties to this suit is to obtain certain insurance money amounting to eight

thousand dollars which by the terms of the contract of insurance is payable to the widow, if any, of the decedent, or, if there be no widow, then to his next of kin, to wit; the defendants in error. The contract of insurance provides as follows: "In all cases a certified copy of the "proceedings before a Surrogate or Judge of Pro- "bate may be accepted as proof of the matters therein "contained and if accepted shall protect the Association "in acting thereon and the Association shall forever "be released from all further claims or liability what- "soever." (See answer, p. 28 of this Brief.) A certified copy of the decree of the Surrogate aforesaid adjudging plaintiff in error not to be the widow of decedent is, therefore, now within the reach of the defendants in error and the insurer. The latter may upon the strength of a certified copy of the Surrogate's decree sought to be reversed in this Court, turn over the eight thousand dollars to the defendants in error, relying upon the adjudication in the decree that plaintiff in error is not the widow. The result would have happened before this but for the kindness of the officers of the Consolidated Stock and Petroleum Exchange, the insurer, who have promised plaintiff in error to await the result of this appeal to the Supreme Court of the United States before paying over the money. If this motion is granted, there will be nothing to prevent payment of the fund to the defendants in error.

If other proceedings had been begun by plaintiff in error after the discovery and probate of the alleged will, whether a suit against the insurer or a suit for dower in the lands, the same question of the validity of the divorce would have arisen and would eventually have reached this Court, unless the question of *res adjudicata* by the present decree bars all further litigation.

After having permitted the Courts of New York to pass upon the question of widowhood, and after those Courts have declared the North Dakota divorce to be void, it comes with ill grace from the defendants in error to now

seek to prevent the further review of the question of the validity of that divorce given by the Constitution of the United States and to seek to compel us to begin *de novo* a litigation in which, because of the law as expounded by the Courts of New York in the case at bar and of the opinions of the State Courts therein, plaintiff in error is bound to be beaten even if the matter is not considered *res adjudicata*, until finally she comes again to this Court to ask a reversal upon the ground that the Courts of New York have not given to the judgment of the Court of North Dakota that full faith and credit commanded by the Constitution of the United States.

POINT FIRST.

Plaintiff in error challenges the right of defendants in error to import into this case at the present time, and under the circumstances shown, the matters not appearing in the printed transcript of record and not brought to the attention of the Courts below, which they now allege for the purpose of dismissing this writ of error.

POINT SECOND.

The plaintiff in error is bound by the adjudication in the decree appealed from that she is not the widow of the intestate, and her only remaining remedy is by review in this Court.

Section 2260 of the New York Code quoted in full at top of page 6 of the brief of the defendants in error shows

that "Administration in case of intestacy *must be granted* " * * first, to the surviving husband or widow."

In order to deny letters of administration to the plaintiff in error it was, therefore, *absolutely* necessary, and was not a mere *incident*, as claimed by defendants in error, for the Surrogate to adjudicate *as he did* as follows: "It is ordered, adjudged and decreed that the petitioner, "*the said Maude E. Kimball is not the widow of Ed-*" *ward C. Kimball, deceased, and is not entitled as his* " *widow to letters of administration* of the goods, chat-" tels and credits which were of said Edward C. Kimball, " deceased" (page 58, Printed Record).

When this decree of the Surrogate was affirmed by the Supreme Court the order of affirmance described the decree in these words only, to wit: "A decree of the Surrogate's Court of the County of Kings made on the eighth " day of March, 1897, ordering, adjudging and decreeing " *that the petitioner* (Maude E. Kimball, plaintiff in error) " *is not the widow of Edward C. Kimball, deceased*" (Printed Record, page 67).

This adjudication in a legal proceeding, to which the next of kin of the decedent were parties on one side and the plaintiff in error, claiming to be the widow of the decedent, was the party on the other side, was in fact brought for the purpose of determining the question of widowhood. The right to letters of administration is a mere incident which attaches to widowhood when proved.

The decisions are unanimous that a prior adjudication is binding in all subsequent actions or proceedings between the same parties *as to all questions necessarily involved in the prior adjudication.* We think it is plain that the question of widowhood was the basis of and was necessarily involved in and decided by the Surrogate's decree, and that the decree that she is not the widow is binding upon plaintiff in error unless reversed by this Court. In any other action or proceeding between her and the de-

fendants in error she will be barred from asserting her widowhood.

New Orleans *vs.* Citizens' Bank, 167 U. S., 371.
Doty *vs.* Brown, 4 N. Y., 71.
White *vs.* Coatsworth, 6 N. Y., 137.
Castle *vs.* Noyes, 14 N. Y., 329.
Brown *vs.* Mayor of N. Y., 66 N. Y., 385.
Parry *vs.* Dickinson, 85 N. Y., 345.
Tuska *vs.* O'Brien, 68 N. Y., 446.

Therefore the plaintiff in error could never succeed in any action for dower or in an action to recover her share of the personalty of the decedent.

That the defendants in error considered the question of widowhood to be the real gist of the litigation is shown by their printed points in their brief on appeal, presented after the finding and probate of the alleged will, quoted *in hac verba* in the affidavit of W. Harlock on this motion, wherein they claim, 1st. That if plaintiff in error is not the widow, then she is not entitled to letters of administration; 2d. That she is not such widow if, when she married Kimball, she had not been divorced from her first husband; 3d. That she had not been lawfully divorced from her first husband. (See affidavit of W. Harlock, p. 32 of this Brief.)

The finding of a will, while it affects and renders unimportant the question of administration, in no way affects the question of widowhood, nor does it affect the validity of the adjudication made that the plaintiff in error is not the widow. Defendants in error were so well satisfied of this that they refused to consent to vacate that adjudication after the finding of the will. (See affidavit of W. Harlock, p. 32 of this Brief.)

They evidently well knew that in case plaintiff in error should bring an action for dower, that adjudication would bind her and be conclusive on the question of widowhood. They also evidently knew that the adjudication, unless reversed by the appellate tribunals of New York or by

this Honorable Court, would justify the Consolidated Exchange in paying the insurance money to defendants in error as next of kin. The proceeding in which this adjudication of the Surrogate was made under the laws of New York a special proceeding, and the decree is a final decree which terminates the same, and the same must be appealed from as in other cases of final decree. This is not the case of an interlocutory decree or order made in the course of a proceeding for administering the estate of the decedent.

With the entry of a decree for letters of administration and issue of such letters the Surrogate has no further jurisdiction except to revoke the letters in a proper case. His jurisdiction to distribute the estate can only be invoked in a new proceeding showing jurisdictional facts and such proceeding is entirely unrelated to the administration.

The defendants in error do not claim that this was not a final decree. In fact they urged that it was such final decree and caused the appeal to be heard in advance as a preferred cause in the New York Court of Appeals by reason of being such final decree (see affidavit of Mr. Harlock, p. 33 of this Brief).

That the proceeding was what is styled, in New York practice, a "special proceeding" to distinguish it from "an action." See

Libbey *vs.* Mason, 112 N. Y., 525, and Secs. 3333, 3334 N. Y. Code of Civil Procedure.

Sec. 2550 of said Code denominates the final determination of the rights of the parties to a special proceeding a "final order or decree." Sec. 2570 of said Code provides for appeals from decrees in special proceedings.

POINT THIRD.

The defendants in error have been guilty of laches in relation to the dismissal of the appeal herein.

The defendants in error have estopped themselves to assert that there is no practical question left in this case because of the finding and probate of the will not only by their refusal to consent to vacate the decree thereafter, but by arguing the appeals in the Courts of New York on the merits and promoting these appeals after knowledge of the facts on their part and without in any manner moving to dismiss the appeals upon the grounds now sought to be availed of here to dismiss this writ of error. Costs have been incurred and plaintiff in error has been charged therewith in judgment, on motion of defendants in error, to the amount of two hundred and nine and 31/100 dollars since the finding and probate of the will (see affidavit of Mr. Harlock, p. 34 of this Brief). If *defendants in error* had made the motion as soon as an appeal was taken from the Surrogate's decree their procedure would have been less open to criticism than is the present motion made after such a lapse of time and change of conditions and after all the Courts of New York have construed the North Dakota divorce in such a manner as would defeat plaintiff in error, irrespective of the question of *res adjudicata*, in every other action or proceeding which she may ever bring until she can again reach this Court by writ of error raising the question now raised here.

POINT FOURTH.

There was no ground upon which plaintiff in error could have succeeded in vacating the decree of the Surrogate adjudging her not to be the widow.

The finding of a will, as shown above, did not make the plaintiff any more or less the widow of decedent than she was before.

There was no "newly discovered evidence" going to the question of widowhood. Both parties had had their day in Court on the question of widowhood, and the defendants in error were unwilling to consent to vacate the decree in their favor and they refused to do so (see affidavit of Mr. Harlock, p. 32 of this Brief). The decree adjudged that plaintiff in error was not the widow, and was not entitled to letters of administration as widow. The subsequent finding of a will did not affect either her widowhood or the fact that she was not entitled to administration. Its only effect was to show that *no one* was entitled to administration; it could not affect the Surrogate's decree to show that plaintiff in error was not entitled to letters *for a reason not known originally*. The section of the Code of New York quoted by defendants in error to show power of the Surrogate to vacate his decree (Section 2481, Code of Civil Procedure) leaves it in the discretion of the Surrogate, who must exercise the power "only in a like case and in the same manner as a Court of "record and of general jurisdiction exercises the same "powers." Here the same Surrogate, after making the decree above mentioned, granted in a subsequent proceeding, upon an allegation of defendants in error that a will had been found and *that the decedent had left no widow*, a decree probating the alleged will without notice to

plaintiff in error, although the Statute provides that on the propounding of a will *the widow must be cited.*

See New York Code of Procedure, Sec. 2615, which prescribes that on a petition for probate the widow of the testator "*must be cited.*"

If the Surrogate had been asked to vacate his prior decree, it would have been opposed by defendants in error, who had refused to consent to its revocation, and who would, no doubt, have claimed that we had had our day in Court on the question of widowhood, and that if the decree were vacated it would enable us to attack the probate proceedings and there again assert the right to be heard as widow. Counsel for plaintiff in error saw then, and see now, no reason for believing that the Surrogate, who had considered the case in all its aspects, would have vacated the decree herein in the absence of the consent of defendants in error. The only effect of such action on the part of the Surrogate would have been to compel this plaintiff in error to move to vacate the probate of the will, on the ground that she was the widow and entitled as a matter of right to be cited and made a party to the probate proceedings. This would have again brought before the Surrogate the question of widowhood which he had already decided in a proceeding between the same parties.

Again, the plaintiff in error would gladly, after the adverse decision of the Surrogate, have vacated the decree and resorted to another tribunal and tested the question either by action for dower or by action against the insurer, but the defendants in error refused to consent, and thus in the opinion of counsel for plaintiff in error compelled this appeal.

It is rather late in the day for the defendants in error to suggest that we might have been relieved from the binding effect of this decree when any suggestion of that sort might have availed us, if made in the early stages of this litigation, whereas now it is only made for the purpose of embarrassing us on this motion.

POINT FIFTH.

The fact that the Surrogate has admitted the will to probate has no bearing on the questions here.

The probate was had without notice to plaintiff in error and was made upon a petition of Harriet A. Kimball, the mother, in which she alleged that *the decedent left him surviving no widow.*

The widow, if there be one, must be cited to show cause why a paper propounded as the will of her husband should not be admitted to probate.

N. Y. Code of Civil Procedure, Section 2615.

It is provided by the said Code, Section 2626, that the probate of a will shall be binding only when the proceedings are "in accordance with the provisions of this article" of the Code, one of which provisions is the citation of the widow, if there be one.

The will here is a will of both real and personal property—hence Section 2627 of said Code applies. That section provides that "a decree admitting to probate a will "of real property made as prescribed in this article estab- "lishes presumptively only all the matters determined "by the Surrogate pursuant to this article *as against a* "*party who was duly cited*, or a person claiming from, "through or under him."

It is plain, therefore, that the defendants in error are begging the question when they claim that plaintiff in error cannot attack the probate collaterally.

If she is the widow, she is not bound because she was not a party to that proceeding.

POINT SIXTH.

There remains in this case, in spite of the subsequent finding and probate of an alleged will, the following very practical results and substantial reasons for denying the present motion:

1st. A binding adjudication that plaintiff in error is not the widow of the decedent, which adjudication will defeat any action she may bring for dower or for the insurance on the life of her late husband. (See Point First, *supra*, and affidavit of W. Harlock, p. 34 of this Brief.)

2d. Outstanding judgments against plaintiff in error for costs of the proceeding amounting to two hundred and nine and 37/100 dollars.

Besides this it would be unjust to grant the motion because:

3d. There is an estoppel by laches and acquiescence of the defendants in error, who have argued the appeals below on the merits, and who cannot now claim that there is no practical question in this litigation.

4th. Irrespective of the question of *res adjudicata*, the Courts of New York by reason of their decisions in this case will necessarily hold the North Dakota divorce invalid in any subsequent litigation to the great disadvantage of plaintiff in error, until she again reaches this Court.

5th. A certified copy of the decree herein that plaintiff in error is not the widow of the decedent is by the contract of insurance a complete protection to the insurer in case of payment of the insurance money to the defendants in error as next of kin on the ground that there is no widow. (See Answer, p. 28 of this Brief. See also pages 4 and 5 *supra*.)

6th. The defendants in error have refused on request to consent to the revocation of the decree herein against us. (See affidavit of W. Harlock, on p. 32 of this Brief.)

7th. Plaintiff in error would be forever deprived of an opportunity of reaching this Court on the merits of her case, and of presenting for its determination the question whether or not full faith and credit has been given by the Courts of New York to the judgment of the North Dakota Court divorcing her from her first husband if the Courts of New York should hold the decree here to be *res adjudicata*, as they undoubtedly would hold in any subsequent action.

8th. Because the suggestion that the Surrogate would have revoked the decree appealed from on our application is speculative and without merit.

POINT SEVENTH.

There is a Federal question involved in this case, to wit: Was full faith and credit given by the Courts of New York to the judgment of the Court of North Dakota divorcing the plaintiff in error from her first husband, James L. Semon?

The whole litigation depends upon the primary question: Is plaintiff in error the widow of the decedent?

Having entered into a prior marriage with one James L. Semon, plaintiff in error was not legally married to the decedent unless she was previously legally divorced from Semon.

The Court of the State of North Dakota had granted her a decree of divorce which the defendants in error assert was not binding outside of the State of North Dakota because, as they allege, the defendant Semon was not served with process within the State of North Dakota, and did not appear in the action.

Whether Semon did or did not appear in the action was the sole question raised, and upon which the solution of the question of widowhood depends.

There was no disputed question of fact below. Both parties relied entirely upon the records of the Court of North Dakota. Those records showed the following facts appertaining to the question of appearance:

When the decree of divorce was first made it recited that the defendant Semon, who was served with process outside of the State, failed to appear or answer in the action and the decree proceeded as upon default of defendant.

Subsequently, however, and before plaintiff in error commenced the proceeding before the Surrogate there was presented to the North Dakota Court a petition by Semon stating that on receipt of the process and pleading he had written an answer thereto and sworn to the same before a Notary Public and in accordance with the directions in the summons he had mailed the same to the attorneys for the plaintiff in the divorce action, intending thereby to deny the charges against himself and in the belief that in view thereof the Court would not grant a divorce against him. Plaintiff's attorneys admitted the due receipt by them of this paper and a copy of it was presented to the North Dakota Court. This paper took up and answered seriatim the charges in the complaint. Plaintiff's attorney informed the North Dakota Court that because of formal defects he treated this paper as a nullity and proceeded as in case of default. Semon, who did not learn of the divorce decree until about the date of his petition, asked the Court to amend the decree so as to recite his appearance by virtue of the aforesaid, he being advised that under the laws of New York he could not marry again if the decree was had on his default; while on the other hand the plaintiff was freed thereby and had actually married again. (See Printed Record, p. 36.) The Court of North Dakota thereupon, upon notice to plaintiff in error, amended its decree *nunc pro tunc* as of the date of the original decree by striking therefrom the recitals of defendant's default to appear and inserting in lieu thereof a recital that defendant Semon duly appeared therein. (See Printed Record, pp. 32 & 41.)

The Surrogate in his opinion treated the question raised by this record as a question of law as it, in fact, is. But he placed among his findings of fact the statement that Semon did not appear in the divorce action. The appellate courts upheld the Surrogate solely on the ground that this finding of fact was conclusive upon them, as they had the power to review questions of law only and not questions of fact. In the Court of Appeals Chief Justice Parker in a dissenting opinion in favor of the plaintiff in error vigorously combated this disposition of the case and claimed that the facts were undisputed and that there was involved only a question of law; Chief Justice Parker (Printed Record, pp. 86 to 89) said, among other things:

"The command of the Constitution of the United "States, that 'full faith and credit shall be given in "each State to the public acts, records and judicial "proceedings of every other State,' seems to call for "a reversal of the order appealed from.

* * * * *

"The record presents an amended decree in that ac- "tion which was in existence at the time these proceed- "ings were instituted, and upon the subject of the de- "fendant's appearance the recital therein is as follows: "'The defendant having appeared herein and answered "and submitted himself to to the jurisdictien of the "court.' When this amended decree was put in evi- "dence, therefore, it was established presumptively "that the court making the decree had acquired juris- "diction over the defendant by his appearance therein. "It was a presumption rebuttable by proper evidence, "if such existed, but in the absence of evidence tend- "ing to disprove the assertion of the decree that the "defendant had appeared and answered and submitted "himself to the jurisdiction of the court, it was conclu- "sive. It was not attacked by evidence; indeed, there "was no evidence in the surrogate's court upon the "subject except the papers which were submitted to the

" Dakota court on the motion made by the defendant " Semon to amend the decree in respect to the recital " referred to. If the judgment, when first entered, had " been in the form in which it now is, as respects the " recital, no one would have thought of challenging it, " certainly not without direct evidence in possession of " the attacking party tending to show that there was " no appearance. But the motion to amend the judg- " ment, made by the defendant in that action after the " death of the intestate, Kimball, seems to have aroused " suspicion that there was some collusion between " Semon and his former wife and that his action was " taken for her benefit, and not for his own, as he " swears. There is, however, no proof that this sus- " picion is well founded, but if it were otherwise it " could not affect *the question before us, which is* " *whether the Dakota court had before it competent* " *evidence upon which to base the determination that* " *it had jurisdiction of the defendant Semon at the* " *time of the entry of the judgment, and authority to* " *amend the decree as of that date, so that it should* " *show such jurisdiction. The evidence upon which* " *the court based its decision allowing the amendment* " *is before us, and it cannot be said that it does not* " *furnish support for the determination of the court.*

" The defendant Semon, who undertook to answer in " that action within the time mentioned in the summons " and subsequently insisted upon such an amendment " of the decree as should recite the fact of his submis- " sion to the jurisdiction of the court, does not chal- " lenge its jurisdiction. That is attempted by a third " party, who produces no other evidence than that " submitted by Semon to the court in his petition pray- " ing for such an amendment as should recite the " jurisdictional facts which existed when the decree " was first made. No prior case can be found where it " has been held that in such a situation an adjudication " of personal appearance can be disregarded, when col-

" laterally attacked by a third party, and the court, of " its own head, held otherwise.

* * * * *

" The letter which Semon insists was his answer and " so intended, was verified, not in the precise form " provided by our statute for the verification of plead- " ings, but nevertheless it declared that it was 'ab- " solutely true in every particular.' The district court " of North Dakota held that it constituted a proper " appearance and answer, ordered it to be filed as such " and amended the decree *nunc pro tunc*, so as to re- " cite the appearance of the defendant. The authority " to grant the amendment was conferred by section " 4938 of the Code of North Dakota, which provides " that 'the court may before or after judgment, in " furtherance of justice, on such terms as may be " proper, amend any pleading, process or proceeding " by adding or striking out the name of any party, " or by correcting a mistake in the name of a party " or a mistake in any other respect, or by inserting " other allegations material to the case, or when the " amendment does not change substantially the claim " or defense by conforming the pleading or proceeding " to the facts proved.' It will be observed that this " section is substantially in the language of section 723 " of our Code of Civil Procedure.

" In granting the order to amend the decree *nunc* " *pro tunc* upon the motion of the defendant in the " action, the court necessarily decided what the evidence " before it asserted, viz., that the jurisdictional facts " existed at the time the original decree was entered. " The motion papers tend to show that such was the " fact. It was not then disputed, nor has it since been " questioned by evidence. The court having reached " the conclusion that the recital in the original decree " did not state the truth, but was a mistake, had the " authority to amend the decree as of the date when " it was first entered so that it should recite the ap-

" pearance of the defendant. Authority to do so was
" expressly conferred upon it by the Dakota statute,
" which, as we have already observed, is substantially
" the same as our own.

" Upon the facts stated would any one question the
" power of a court of original jurisdiction in this State
" to grant such an amendment? If granted, would
" the suggestion be entertained that the judgment
" could be attacked collaterally without other evidence
" than that upon which the court based its determina-
" tion? Certainly not. And it should not be forgotten
" that it is our duty to give the same force and effect
" to this determination of our sister State that we would
" give to it were it made by our own courts.

" It is suggested that the learned surrogate's court
" found as a fact that there was no appearance by
" the defendant Semon in that action and that we are
" concluded by his finding. The surrogate found the
" facts to which I have already referred, and because
" he saw fit to insert among his findings of fact his
" conclusion of law that the defendant did not appear,
" does not deny to us the right, nor relieve us from
" the duty, of determining what conclusion of law the
" facts really demanded.

" I advise a reversal of the order."

POINT EIGHTH.

Even if Semon never appeared or answered in the divorce action there remains a Federal question, to wit:

The North Dakota Court having jurisdiction of the person of plaintiff in error and of the subject matter of the action, to wit, the status of plaintiff in error, has, by proceedings in the nature of proceedings *in rem*, adjudicated that plaintiff in error be divorced from defendant

Semon and has declared her to be a single woman. Marriage is a status, citizenship is a status, infancy or minority is a status. Each State has absolutely jurisdiction to determine the status of its residents.

This Honorable Court will be called upon in this case to decide, in case they hold that Semon's appearance was improperly recited in the North Dakota decree, whether or not full faith and credit was given to the decree in its original form. The inquiry then would divide itself into two questions: 1st, Whether the plaintiff in error, under the provisions of the Constitution of the United States, can, by decree of a North Dakota Court having jurisdiction of her person, be declared to be divorced, and by a subsequent decree of the Courts of New York be declared to be still married and the wife of the person from whom she was divorced by the North Dakota Court. 2d. Can third persons attack collaterally a decree of divorce granted in another State when both of the parties to the divorce are living and both acquiesce in such decree.

Cheever *vs.* Wilson, 9 Wall., 108.
Pennoyer *vs.* Neff, 95 U. S., 714.
Cooley on Cons. Lien, 400.
2 Bishop on Marriage & D., Sec. 150 *et seq.*

Without arguing these questions at this time, we may refer to "Bishop on Marriage and Divorce," who states this constitutional question substantially as follows:

> The wife having obtained in North Dakota a divorce from her former husband residing in New York, the New York Courts, by force of the Constitution of the United States, are not permitted to say that her status has been reduced to non-marital *as to North Dakota*, but it remains marital *as to New York*. If the effect of the sentence is, in North Dakota, to make her a single woman there, its effect is also, and equally, and to exactly the same extent, to make her a single woman in New York. And such she is made in all the other States in the Union. The

North Dakota decree relieved her of her marital status. To deny the validity of that proceeding, where in the conduct of the cause the only possible citation had been given to the husband in New York, would be to attempt an interference with the Government of North Dakota in its own dominion, by deny. ing its authority to fix the status of its own resident citizens.

2 Bish. Mar. & Div., Sec. 187.

The tribunals of every civilized country hold a woman who has no husband to be a single woman. In this case the wife had no husband; for the North Dakota Court, by whose decision, so far as her status is concerned, the New York Courts must acknowledge themseves to be bound, had reduced her status to that of a single woman. Marriage is a status, and the severance of either party from the combination terminates the status. This principle is oftenest illustrated in the death of a married party. No one ever pretended that when a husband or wife is dead the other remains married. A thing which can exist only in pairs cannot continue its existence after one of the two constituents is removed.

The petitioner being freed from her marital relations with her former husband, had a perfect right to marry again anywhere, as if her former husband were actually dead.

POINT NINTH.

The motion to dismiss the writ of error should, therefore, be denied with costs.

WALDEGRAVE HARLOCK,
GEORGE BELL,
Counsel for Plaintiff in Error.

IN THE SUPREME COURT OF THE UNITED STATES. 1

MAUDE E. KIMBALL,
Plaintiff in Error,

against

HARRIET A. KINBALL, HARRIET I. JAMES and JOHN S. JAMES,
Defendants in Error.

No. 594.
Answer.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States: 2

MAUDE E. KIMBALL, plaintiff in error herein, for her answer to the petition of Harriet A. Kimball, Harriet I. James and John S. James, the defendants in error herein, dated and verified March 17th, 1898, praying that the writ of error allowed herein be dismissed with costs, or that the order of the Court of Appeals of the State of New York be affirmed with costs, and for other relief, respectfully shows to this Honorable Court, as follows:

I.—The plaintiff in error claims to be the lawful widow of Edward C. Kimball, deceased, and as such widow instituted a proceeding by petition in the Surrogate's 3
Court in the County of Kings, in the State of New York, to vacate letters of administration issued by said Surrogate upon the estate of decedent without notice to this plaintiff in error, and in disregard of her rights as widow, and to have such letters of administration awarded to her. The printed record, pages 2, 3 and 4, contains the petition of plaintiff in error aforesaid.

II.—The defendants in error answered said petition, and by their answer alleged, among other things, that while there had been a ceremonial marriage between the

plaintiff in error and the decedent, nevertheless, that prior thereto the plaintiff in error and one James L. Semon intermarried in the City of New York, and that thereafter the plaintiff in error commenced an action in a Court of the State of North Dakota against said James L. Semon for a divorce, and that upon his default to appear or answer, said Court adjudged and decreed that the bonds of matrimony entered into between plaintiff in error and said James L. Semon be dissolved, and the said parties and each of them absolutely released from the bonds of matrimony; and said answer averred that said decree of divorce was and is absolutely null and void in the State of New York, and that the subsequent marriage between the plaintiff in error and the said Edward C. Kimball was absolutely null and void by reason of the invalidity of the decree of divorce aforesaid. The printed record, pages 12 and 13, contains the answer aforesaid.

III.—The plaintiff in error replied to said answer, alleging that *in truth and in fact* said James L. Semon appeared and answered in said action for divorce in the Court of North Dakota aforesaid, and that while the decree therein as originally entered recited the default of said James L. Semon to appear or answer, nevertheless, the record and decree in said divorce action were duly amended by said Court of North Dakota *nunc pro tunc* as of the date of the original decree so as to recite such appearance and answer of the said James L. Semon, and that such amendment was duly made before the commencement of the proceeding by the plaintiff in error as aforesaid. The printed record, at pages 28, 29 and 30, contains the reply of plaintiff in error aforesaid.

IV.—That upon the pleadings aforesaid the parties went to trial before said Surrogate, the defendants in error first putting in evidence the decree and proceedings in the divorce action as the same were before the amendment, and the plaintiff in error thereupon putting in evidence the decree and proceedings in the divorce action as

amended *nunc pro tunc*. The printed record, at page 45 7
et seq., contains the proceedings upon the trial before the Surrogate.

V.—Thereupon the Surrogate made a decree duly entered on the 8th day of March, 1897, whereby he adjudged and decreed that the plaintiff in error, "Maude E. Kim-"ball, is not the widow of Edward C. Kimball, deceased, "and is not entitled as his widow to letters of adminis-"tration of the goods, chattels and credits which were of "said Edward C. Kimball, deceased," and dismissing the petition of plaintiff in error. The printed record, at pages 57 and 58, contains the decree aforesaid.

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VI.—That by the statutes and laws of the State of New York a widow is entitled absolutely and as a matter of right to administer upon the personal estate of her husband dying intestate, and is entitled, as a matter of right, to letters of administration upon the estate of such deceased husband. That the statutes and laws of the State of New York provide that the proceeding for the determination of the right of any person to letters of administration upon the estate of a decedent is a special proceeding, and that the decree therein made is a final decree and closes the proceeding, and that the only remedy for a dissatisfied party is by appeal from such decree within the time allowed by law for appeals from final judgments and 9
decrees.

VII.—Upon information and belief, that after the making of the decree aforesaid, and on or about the 25th day of March, 1897, attorneys for the defendants in error wrote to W. Harlock, Esq., attorney for plaintiff in error, the letter annexed to the petition to dismiss the writ of error wherein they allege that a last will and testament of the decedent was found on the 23d inst. and was admitted to probate by the Surrogate of Kings County on the 25th day of March, 1897, and that said Surrogate had revoked the letters of administration issued by him as aforesaid on

10 November 10th, 1896, to the defendants in error, and in lieu thereof had issued letters testamentary to two of the defendants in error, to wit, Harriet A. Kimball and Harriet I. James.

That all of the proceedings referred to in the letter aforesaid were had, if at all, without any notice to plaintiff in error until the letter aforesaid, and without making the plaintiff in error a party to such proceedings. That by the statutes and laws of the State of New York the widow of a decedent is entitled to be cited upon the proceedings for the probate of an alleged last will and testament of her husband, but that no citation was issued to the plaintiff in error upon the probate of the alleged will
11 as aforesaid, but on the contrary, as appears by the petition to dismiss the writ of error herein, the defendants in error, Harriet A. Kimball and Harriet I. James, prevented the issue of a citation to plaintiff in error in said proceeding by alleging in their petition for the probate of the alleged will "that said deceased left him surviving no widow." That by reason of the aforesaid, the adjudication upon the probate of said alleged last will and the probate thereof are not binding upon the plaintiff in error, and she may attack the same collaterally or directly. That long prior to March 25, 1897, oral notice of the intention of plaintiff in error to appeal from the decree of the Surrogate adjudg-
12 ing that she was not the widow of the decedent was given to the defendants in error and their attorneys by the attorney of the plaintiff in error. That when said letter was received by Mr. Harlock, plaintiff in error immediately requested defendants in error to consent to vacate the decree of the Surrogate of March 8th, 1897, adjudging that plaintiff in error was not the widow of the decedent, Edward C. Kimball, but defendants in error refused to so consent. Being advised by her counsel that the adjudication of said Surrogate that plaintiff in error was not the widow of said decedent might be binding and conclusive and *res adjudicata* in all proceedings, suits or actions brought thereafter by plaintiff in error to enforce her

rights as widow unless reversed on appeal, plaintiff in 13
error appealed from the decree of the Surrogate aforesaid to the Supreme Court of the State of New York. After such appeal was taken counsel for defendants in error stated to counsel for plaintiff in error that they would move to dismiss the appeal upon the same grounds now taken by them to dismiss the writ of error, whereupon they were again requested to consent to vacate the decree of the Surrogate appealed from, but they refused.

Upon the representation to counsel for the defendants in error by counsel for plaintiff in error that such decree might be *res adjudicata* as to the widowhood of plaintiff in error and might be binding upon her in a suit for dower 14
in the real estate of decedent, or in other proceedings, as, for example, a proceeding by plaintiff in error to revoke the probate of the will made without notice to her, defendants in error refrained from any attempt to dismiss the appeal on the ground of the probate of the alleged will and revocation of the letters of administration, and continued to litigate the question of widowhood in the proceedings now brought to this Honorable Court by writ of error. Accordingly no such motion to dismiss was made, but the appeal was argued in due course, and after hearing both sides on the merits the decree of the Surrogate was affirmed, with costs. Whereupon a decree of affirmance on said appeal and for ninety-eight and 32/100 dol- 15
lars costs was entered against plaintiff in error, which judgment or decree still stands unreversed and unsatisfied, and the defendants in error have never offered, and do not offer on this motion, to release plaintiff in error from said costs, decreed as aforesaid. The printed record, at pages 67 and 68, contains the decree of affirmance, with costs.

VIII.—That thereafter an appeal was duly taken from said decree of affirmance to the Court of Appeals of the State of New York. That the defendants in error made no motion to dismiss such appeal, but appeared and were heard on said appeal upon the merits, and the Court of

16 Appeals affirmed the decree appealed from with costs; whereupon the defendants in error caused to be entered in the Surrogate's Court a decree of affirmance upon the remittitur from the Court of Appeals with one hundred and eleven and 05/100 dollars costs against plaintiff in error. (Printed Record, p. 75.) That such decree still stands unreversed and unsatisfied and defendants in error have never offered to remit or release said costs against plaintiff in error, which costs, together with the costs previously entered as aforesaid against plaintiff in error, amount to the sum of two hundred and nine and 37/100 dollars.

17 IX.—That said decedent died seized of certain real estate, as alleged in the petition to dismiss the writ of error, and also possessed of certain personal property not exceeding two thousand dollars in value. That said decedent was at the time of his death a member in good standing of the Consolidated Stock and Petroleum Exchange of New York, and was a participant in the so-called "Gratuity Fund," and a member of the Gratuity Fund Association of said Exchange, and had duly paid all dues and assessments as such member and participant. That said Exchange agreed with said decedent in his lifetime in consideration of payments of dues and assessments as
18 aforesaid as follows, to wit: "The Trustees of the said "Gratuity Fund shall within one year after proof of "death of any member participating in said Fund pay "out of the money so collected the sum of eight thou- "sand dollars. Should a member participating in said "Fund die leaving a widow and no children, the whole "sum shall be paid to such widow for her own use. "Should a member participating in said Fund die, leav- "ing neither widow or children, then the whole sum shall "be paid to the next of kin of the deceased, as such next "of kin shall be defined by the law of the State of New "York. In all cases a certified copy of the proceedings, "before a Surrogate or Judge of Probate, may be ac-

"cepted as proof of the matters therein contained, and if 19
"accepted, shall protect the Association in acting
"thereon, and the Association shall forever be released
"from all further claims or liability whatsoever." That
the sum of eight thousand dollars due and payable as
aforesaid has been collected by said Consolidated Ex-
change, and said Exchange now holds the same awaiting
the final determination of the rights of plaintiff in error
and defendants in error thereto. That unless this Honor-
able Court takes cognizance of the matter in issue, and de-
nies the present motion to dismiss the writ of error, the
said Exchange may, pursuant to the provisions above
cited, accept a certified copy of the decree adjudicating 20
plaintiff in error not to be the widow of decedent, and
pay over the sum of eight thousand dollars aforesaid to
the defendants in error, and claim to be protected from all
further claims respecting the same.

X.—The Federal questions involved are shown by the Assignment of Errors at page 79 of the Printed Record; those questions resolve themselves into the following: Did the Courts of New York give full faith and credit to the decree of the Court of the State of North Dakota, declaring that both parties appeared, and adjudicating them divorced?

21

WHEREFORE, the plaintiff in error prays that the motion to dismiss the writ of error, and for affirmance of the decree of the Court of Appeals of the State of New York, be denied, with costs.

Dated New York, April 4th, 1898.

MAUDE E. KIMBALL.

WALDEGRAVE HARLOCK,
Attorney for Plaintiff in Error.

22 STATE OF NEW YORK, }
City and County of New York, } ss.:

MAUDE E. KIMBALL, being duly sworn, deposes and says: That she has heard read the foregoing answer subscribed by her and knows the contents thereof, and that the same is true of her own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters she believes it to be true.

MAUDE E. KIMBALL.

Sworn to before me this 4th }
day of April, 1898. }

F. W. LONGFELLOW,

23 [SEAL.] Notary Public (68),
New York County, N. Y.

STATE OF NEW YORK, }
County of New York, } ss.:

I, WILLIAM SOHMER, Clerk of the County of New York, and also Clerk of the Supreme Court for the said County, the same being a Court of Record, do hereby certify that F. W. Longfellow, before whom the annexed deposition was taken, was at the time of taking the same a Notary Public of New York, dwelling in said County, duly ap-
24 pointed and sworn, and authorized to administer oaths to be used in any Court in said State, and for general purposes; that I am well acquainted with the handwriting of said Notary, and that his signature thereto is genuine, as I verily believe.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court and County the 5th day of April, 1898.

WM. SOHMER,
Clerk.

SUPREME COURT OF THE UNITED STATES. 25

MAUDE E. KIMBALL,
Plaintiff in Error,

against

HARRIET A. KIMBALL, HARRIET I. JAMES and JOHN S. JAMES,
Defendants in Error.

No. 594.
Affidavit in Support of Answer.

UNITED STATES OF AMERICA,
STATE OF NEW YORK,
City and County of New York } ss: 26

WALDEGRAVE HARLOCK, being first duly sworn, deposes and says, as follows:

I am an attorney and counsellor at law, having my office in the City of New York. I am attorney for the plaintiff in error herein, and was her attorney in all the proceedings in the Surrogate's Court of Kings County set forth in the printed record herein. I have read the answer of plaintiff in error to the petition to dismiss the writ of error herein, which answer is verified April 4th, 1898, and know the contents thereof, and the allegations therein are true to my knowledge. The facts regarding 27 the finding and probate of an alleged will of the deceased since the Surrogate's decree relied upon to dismiss the writ of error do not appear in the printed transcript of the record herein, and were not brought to the attention of the Courts of New York in any manner. After the decree of the Surrogate now sought to be reversed in this Court and as soon as I was informed by Messrs. Arnold & Green, attorneys for defendants in error, of the finding of an alleged will of the decedent, Edward C. Kimball, and of the *ex parte* probate thereof, I stated to Lemuel H. Arnold, Esq., of Arnold & Green, that I would, if they did not oppose, or with their consent, ask the Surrogate to vacate the decree

28 adjudging that plaintiff in error was not the widow of said decedent, and that I would thereupon bring an action on behalf of plaintiff in error against the Consolidated Stock and Petroleum Exchange of New York to recover the sum of eight thousand dollars held by said Exchange *and ready to be paid by it to the widow* of said Edward C. Kimball, if he left one, or to the defendants in error, as next of kin, if decedent left no widow, to which action defendants in error should be parties and wherein the rights of all interested could be determined. Mr. Arnold refused to consent to or not to oppose the revocation of the Surrogate's decree aforesaid, and fearing that in any
29 action brought by plaintiff in error such decree would be used as a prior adjudication that plaintiff in error was not the widow of decedent, I was compelled to and did appeal from such decree. Mr. Arnold thereupon intimated to me that he would move to dismiss the appeal on the ground that the discovery and probate of a will rendered the proceedings for letters of administration useless, but I urged upon him the danger to my client from the adjudication of the Surrogate which he had refused to consent to vacate, whereupon he refrained from moving to dismiss the appeal. From that time said attorneys for defendants in error actively promoted the appeal and argued said ap-
30 peal on the merits and without in any way calling the attention of the Court to the probate proceedings or the alleged effect thereof. In and by their printed brief on the appeal to the Supreme Court of New York the said attorneys for defendants in error made the following points —as their first three points—which I quote from their said brief, to wit:

" POINTS.

I.

If the appellant is not the lawful widow of Kimball, then it follows that she is not entitled to letters of administration on his estate, and has no standing

in court to attack the letters of administration granted by the Surrogate's Court to the respondents Harriet A. Kimball and John S. James. 31

II.

The appellant is not the lawful widow of Kimball, if, when she entered into the ceremony of marriage with him, she had not been divorced from Semon.

III.

That she had not been lawfully divorced from Semon conclusively appears. The judgment roll in the divorce action shows that Semon was served with the summons in the State of New York, and that he did not appear in said action nor plead therein. He was never a resident of nor domiciled in North Dakota, but resided in this State. It is perfectly well settled that a judgment of divorce such as was granted to the petitioner in the action above referred to was null and void, because the Court did not have jurisdiction to grant the divorce, and that such a judgment may be impeached collaterally for want of jurisdiction in the Courts of this State." 32

Upon the affirmance of the decree by the Supreme Court, I instituted an appeal to the Court of Appeals; whereupon said attorneys for defendants in error took steps to get said appeal heard as a preferred cause, and they themselves caused the appeal to be placed upon the calendar for the hearing of "appeals from final orders in special proceedings," which, under the rules of the Court of Appeals of the State of New York are entitled to early hearing. In said Court of Appeals the appeal was argued by both sides on the merits, and no motion to dismiss on the grounds aforesaid was made in said Court, and the attention of that Court was in no manner called by either side to the alleged will and probate thereof or to the alleged effect thereof. 33

34 Although, without notice to plaintiff in error or to me, the Surrogate has revoked the letters of administration issued to the defendants in error, the decree denying the petition of plaintiff in error for the issue of letters of administration to her has never been revoked. That decree finds as a basis for denying the prayer of the plaintiff in error that she is not the widow of the decedent. It is this finding and decree which defendants in error and their counsel have steadily refused to allow to be cancelled and which stands as an adjudication that plaintiff in error is not the widow of decedent, and which decree she can only be relieved from by this Honorable Court by this writ of error.

35 The moneys payable to the widow or next of kin, as the case may be, by the Exchange aforesaid are in effect proceeds of a life insurance contract. In any suit brought by plaintiff in error to recover that money as widow the Exchange would pay the money into Court and interplead the defendants in error, leaving the rival claimants to litigate the question of their rights thereto, said Exchange having no further interest in the litigation. In such litigation I verily believe that the decree of the Surrogate adjudging plaintiff in error not to be the widow of decedent would be relied upon by defendants in error as a prior adjudication to defeat plaintiff in error. Judgments for

36 costs of the proceedings, in the Courts of the State of New York, aggregating two hundred and nine and 37/100 dollars, have been entered against the plaintiff in error, and the same stand unsatisfied of record, nor have defendants in error or their attorneys ever offered to remit or release the same.

Even if the defendants in error should now consent to the cancellation of the Surrogate's decree and the judgments of affirmance, which, however, they have not offered to do on this motion or otherwise, nevertheless any suit brought by plaintiff in error to assert her rights to said insurance money or her dower in real estate of decedent will involve the question of the effect of the North Dakota

divorce. By reason of the decisions of the Courts in this 37
present proceeding the plaintiff in error would be defeated in every court of the State of New York and would finally be obliged to come to this Court by writ of error after thus needlessly going for a second time through the State Courts.

It is, therefore, respectfully submitted that the writ of error herein be not dismissed.

WALDEGRAVE HARLOCK.

Subscribed and sworn to before me }
this 4th day of April, 1898. }

F. W. LONGFELLOW,
[SEAL.] Notary Public (68), 38
New York County, N.Y.

STATE OF NEW YORK, }
County of New York. } ss.:

I, WILLIAM SOHMER, Clerk of the County of New York, and also Clerk of the Supreme Court for the said County, the same being a Court of Record, do hereby certify that F. W. Longfellow, before whom the annexed deposition was taken, was, at the time of taking the same, a Notary Public of New York, dwelling in said County, duly appointed and sworn, and authorized to administer oaths to 39
be used in any Court in said State, and for general purposes; that I am well acquainted with the handwriting of said Notary, and that his signature thereto is genuine, as I verily believe.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court and County, the 5th day of Apl., 1898.

WM. SOHMER,
Clerk.

No. 248.

Dale

Brief of Harlock for P. C.

IN THE SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1898.

Filed Feb. 25, 1899.

MAUDE E. KIMBALL,
Plaintiff in Error,

against

HARRIET A. KIMBALL, JOHN S. JAMES and HARRIET I. JAMES,
Defendants in Error.

No. 248.

In Error to the Surrogate's Court of the County of Kings, State of New York.

BRIEF FOR PLAINTIFF IN ERROR.

WALDEGRAVE HARLOCK,
GEORGE BELL,
For Plaintiff in Error.

In the Supreme Court of the United States,

OCTOBER TERM, 1898.

MAUDE E. KIMBALL,
Plaintiff in Error,

AGAINST

HARRIET A. KIMBALL, JOHN S. JAMES and HARRIET I. JAMES,
Defendants in Error.

BRIEF FOR MAUDE E. KIMBALL, PLAINTIFF IN ERROR.

Statement.

This case is brought to this Court by writ of error to the Surrogate's Court of the County of Kings, in the State of New York.

The plaintiff in error presented a **Petition** to said Surrogate's Court on the 17th day of December, 1896, alleging that she was the widow of one Edward C. Kimball, who died intestate in the said County of Kings on the 9th day of November, 1896, and praying that letters of administration upon his estate theretofore issued to two of the defendants in error, Harriet A. Kimball and John S. James, be revoked and that such letters be issued to her as such widow, the former letters having been issued without notice to her (Transcript, p. 2).

To this petition the defendants in error pleaded by **Answer** that although there had been a ceremony of marriage performed between plaintiff in error and said Edward C. Kimball during his lifetime that the plaintiff in error had previously married one James L. Semon, and also that she had, four years before said ceremony of marriage, obtained a decree of divorce against said Semon in the State of North Dakota, but that said Semon was not a resident of that State and was not served with process in said action within the said State and that he did not appear in said action, and that thereby the decree of divorce entered in said action, prior to the marriage ceremony between plaintiff in error and the deceased, was absolutely void (Transcript, p. 12). A copy of the record in the divorce action as the same stood prior to amendment thereof was annexed to this answer and marked "Exhibit A."

To this answer plaintiff in error pleaded by **Reply** (Transcript, p. 28) denying that said Semon did not appear in the divorce action and alleging that the record in the divorce action was not fully presented in the answer of the defendants in error, that by inadvertence and mistake the appearance of said Semon was not recited in the decree of divorce as originally entered, but that thereafter, and before the commencement of this proceeding before the Surrogate, said decree was duly amended *nunc pro tunc* as of the date of the original decree, so as to recite the appearance of said Semon in said divorce action. An exemplified copy of the papers on the motion for amendment and the order thereon and of the decree as amended were annexed to said reply as exhibits (Transcript, pp. 31 to 44).

Issue having been joined on these pleadings, the matter came on for **trial** before the Surrogate, whereupon

the defendants in error, having the affirmative of the issue, read in evidence an exemplified copy of the judgment roll in the divorce action as it stood prior to amendment. The plaintiff in error then read in evidence exemplified copies of the amended decree and of the proceedings upon which the amendment was granted, and also extracts from the laws of North Dakota. Both parties having admitted on the record certain matters of no materiality here, the trial was then closed (Transcript, pp. 45, 46).

The widow of a person dying intestate is, by the laws of New York, entitled as a matter of right to administration upon his estate.

Section 2260, Code of Civil Procedure of the State of New York, is as follows: "Administration in case of intestacy must be granted to the relatives of the deceased entitled to succeed to his personal property who will accept the same in the following order: (1) to the surviving husband or widow; (2) to the children, (3) to the father" * * *

The learned Surrogate was, therefore, called upon to decide in this proceeding the question whether the plaintiff in error was or was not the widow of the deceased. The Surrogate in his **decision** made a finding of fact as follows:

"Eighth: After the death of said Edward C. Kimball, and in December, 1896, the said James L. Semon applied to the Court of North Dakota which granted the decree of divorce, to have a letter, which he sent to the plaintiff's attorneys after receiving the summons in the divorce action, filed in said Court as his answer in the divorce suit *nunc pro tunc* as of the date of its receipt by the plaintiff's attorneys, and to have said decree of divorce, made on the 26th day of January, 1891, amended *nunc pro tunc* as of that date, by striking out the recital to the effect that the defendant failed to answer, demur

or make any appearance in said divorce suit, and by inserting in place thereof the following words: 'The defendant having appeared herein and answered and submitted himself to the jurisdiction of the Court.' Notice of said application was given only to the attorneys who appeared for the plaintiff in that divorce suit, and an order was made by the said Court on the 16th day of December, 1896, on default of the plaintiff, granting said application, and purporting to amend said decree of divorce *nunc pro tunc* in accordance with said application, but said Court did not have the power or jurisdiction to make such an order." (Transcript, p. 56.)

And he found as a conclusion of law as follows:

"Second: The Court of North Dakota did not have jurisdiction to make said order of December 16th, 1896, amending the said decree of divorce *nunc pro tunc*, and said order was and is a nullity" (Transcript, p. 56).

Said Surrogate also delivered an opinion stating as follows:

"Moreover, I am of the opinion, upon the UNDISPUTED FACTS, that the North Dakota Court had not "jurisdiction to make the amendment.

"The letter which is in evidence and referred to as "constituting the appearance of the defendant is not in "any sense or upon any theory of practice an appearance in the suit. It is not entitled, is improperly verified, contains no demand for relief, and does not even "contain any intimation of any intention on the part "of the defendant to appear and submit himself to the "jurisdiction of the Court. It is a mere verified letter "and nothing more" (Transcript, p. 54).

The Surrogate upon the above reasoning found that Semon did not appear in the action, that, therefore, the *divorce was invalid*, and that plaintiff in error was not lawfully married to Edward C. Kimball and could not lawfully marry him, because she was the wife of Semon and was not the widow of said Kimball, and a decree was accordingly entered denying the prayer of the petition of

plaintiff in error and declaring that she was not the widow of the deceased (Transcript, p. 57).

Exceptions were duly taken to each and every of the findings of fact and conclusions of the Surrogate, and to his refusals to find, (Transcript, pp. 61 to 64), and an appeal was prosecuted by the plaintiff in error to the Appellate Division of the Supreme Court where the decree was affirmed. The opinion of the Appellate Division declared that the question whether Semon in fact appeared in the divorce action was open to collateral attack, and that the Surrogate having found as a matter of fact that Semon did not appear, the Court saw no reason to differ with him in that finding (Transcript, p. 72, fols. 117, 118). An appeal was then taken by plaintiff in error to the Court of Appeals of the State of New York. That Court affirmed the decree. The **opinion** of the majority of the Court stated that whether or not Semon appeared in the divorce action was a question of fact and that the Court was prohibited from reviewing a question of fact (Transcript, p. 85).

Chief Justice PARKER of the Court of Appeals, however, wrote a **dissenting opinion** stating that the North Dakota Court having adjudicated that Semon did appear in the action, and such adjudication having been based upon evidence tending to support it, it was not competent for the Courts of New York State *without any evidence other than that presented to the North Dakota Court* to hold otherwise. He said:

"In granting the order to amend the decree *nunc pro tunc* upon the motion of the defendant in the action, the Court necessarily decided what the evidence before it asserted, viz., that the jurisdictional facts existed at the time the original decree was entered. The motion papers tend to show that such was the fact. It was not then disputed, nor has it since been questioned by evidence" * * * (Transcript, p. 88, fol. 150).

Chief Justice PARKER further said:

"It is suggested that the learned Surrogate's Court "found as a fact that there was no appearance by the "defendant Semon in that action and that we are con- "cluded by his finding. The Surrogate found the facts "to which I have already referred, and because he saw "fit to insert among his findings of fact his conclusion "of law that the defendant did not appear, does not "deny to us the right, nor relieve us from the duty, of "determining what conclusion of law the facts really de- "manded" (Transcript, p. 89).

A decree of affirmance having been entered by the Surrogate upon the remittitur from the Court of Appeals (Transcript, p. 74) a writ of error was sued out of this Court (Transcript, p. 76).

The questions involved require that we should now make a **statement of the facts presented to the North Dakota Court** upon the application of James L. Semon to amend the original decree of divorce. Said Semon on December 16, 1896, presented a petition to the North Dakota Court praying for an amendment of the decree so as to recite his appearance in the divorce action instead of reciting his default to appear therein (Transcript, p. 36). Said petition alleges among other things:

"And your petitioner, desiring to appear in said "action and to answer said complaint as required by "said summons, did on the 23rd day of October, 1890, "at the City of New York aforesaid, where your peti- "tioner then resided, prepare, make and sign his answer "to the said complaint, and did subscribe and swear to "the same on the 23rd day of October, 1890, before "James T. Clark, a Notary Public in and for the City "and County of New York, duly commissioned by law "to take oaths and acknowledgments in the said City and "County; and on the said 23rd day of October, 1890, "your petitioner served by mail his said answer upon

"Winterer & Winterer, attorneys for plaintiff, by per-
"sonally depositing in the postoffice in the said City of
"New York his said answer, enclosed in a sealed en-
"velope. with the postage prepaid, addressed to Win-
"terer & Winterer, attorneys for the plaintiff, at Valley
"City, North Dakota. That a copy of said answer is
"hereto annexed marked 'A.'

"That your petitioner prepared and sent said answer
"without the aid or advice and without consultation
"with any counsellor or attorney at law, in order to
"avoid the expense thereof; and with the intention to
"have the said answer presented to this court so as to
"inform the Court of your petitioner's position and de-
"fense in this action, and to submit himself to the juris-
"diction of the Court herein, and to have his rights
"adjudicated by this Court without incurring any ex-
"pense in the matter. That your petitioner believed
"that said answer so subscribed and sworn to by him
"and sent to plaintiff's attorneys would be filed in Court
"as part of the proceedings herein; but your petitioner
"has learned within the last few days, for the first time,
"that the same was not filed, and your petitioner has
"never been aware until now of the recitals of his de-
"fault in the decree as aforesaid, and has never been
"served with a copy of said decree.

"That your petitioner is informed and believes that
"the plaintiff, Maude E. Semon, relying upon said
"decree, married one Edward C. Kimball on the 29th
"day of June, 1895; but your petitioner has not married
"since said decree was made, and being a resident and
"citizen of the State of New York at the time of the
"service on him of the summons as aforesaid, and ever
"since, your petitioner is now advised by counsel that
"it would be impossible for him to marry again in view
"of the erroneous recital in the decree as aforesaid to
"the effect that your petitioner did not appear or answer
"in said action but made default therein, as the laws of
"the State of New York do not regard a decree of di-
"vorce against a non-resident defendant granted by de-
"fault by the courts of another State as of any binding
"effect outside of the State in which it was granted, in
"cases where there is no appearance in the action by the
"non-resident defendant or no service of process on him
"within the State wherein the decree is granted.

"That your petitioner desires that his said answer, "or the copy thereof hereto annexed, be filed herein "*nunc pro tunc* by leave of this Court, and that said "decree be amended *nunc pro tunc* so as to recite the "appearance of your petitioner in order that said decree "may conform to the facts as they existed at the time "it was granted, and may show upon its face that your "petitioner appeared and answered and submitted him-"self to the jurisdiction of this Court in this action. "Your petitioner desires thereby to make the decree of "as binding effect in the State of New York where your "petitioner resided when said action was commenced "and ever since has resided, as said decree has in the "State of North Dakota, and in order that your peti-"tioner may not violate the laws of the State of New "York in case of his re-marriage at any time hereafter "to any person other than the plaintiff during her life-"time" (Transcript, pp. 36 and 37).

Exhibit A mentioned in said petition and attached thereto is as follows:

NEW YORK, Oct. 23, '90.

MR. HERMAN WINTERER:

DEAR SIR: In reply to the contents of paper served on me Oct. 15, 1890, by your representative, relative to my wife and children, I would say that my wife has sworn to matters untrue. For instance, this matter of desertion, this is surprising to me, as my wife personally ordered me from the house and stated that she never wished to see me again, this was the fore part of September, 1889. I did as I was ordered, having no alternative, as I was living under her mother's roof. Now is it at all likely that a domesticated man (as my wife will tell you I was) would give up a good home, without good reasons for so doing? It was only a short time after I left the house, that they moved and took up another dwelling place, I never receiving any notification where I could see my children. I have meditated over this matter more than once, and have often wondered why it was

done. It is now over a year ago, since I saw my children last.

In relation to my not providing for her I would say, that I have always given what I had, and very often more than I could afford. I am now carrying on the painting business which was left to me by my father who is now dead. When I came into possession of the business it was very much in debt. I have been trying ever since I took it to wipe out this burden, but as yet have not fully accomplished my aim and desire. There were times when I was not doing very much in my business, and consequently could not provide as promptly as I would like to. My wife swearing that I did not provide for her the common necessaries of life simply tells an untruth.

As to my drinking habits, I will admit that I have indulged a little too much at times, but now have got bravely over that, having not tasted it in over a year. As the father of my children I was glad to hear of their existence, and hope in the near future of having the pleasure of seeing my own flesh and blood.

Very respectfully,

JAS. L. SEMON,
803 9 Ave., N. Y. C.

City and County of New York, ss.:

JAMES L. SEMON, being duly sworn, deposes and says that he is the writer of the foregoing letter, that he knows the contents thereof, and that it is absolutely true in every particular.

JAS. L. SEMON. [SEAL.]

Subscribed and sworn to before me this 23rd day of October, 1890.

JAS. T. CLARK,
[L. S.] Notary Public,
For Co. of N. Y.

(Transcript, p. 40.)

The questions involved in this case are as follows:

(1.) The primary question is: Is the plaintiff in error the widow of Edward C. Kimball, deceased?

(2.) This question depends upon the validity of the divorce of plaintiff in error from her first husband James L. Semon.

The validity of that divorce depends,

(*a*) Upon the jurisdiction of the North Dakota Court irrespective of the appearance of James L. Semon therein; and

(*b*) Upon the power of the North Dakota Court to amend its decree, upon the facts presented to it, so as to recite the appearance of James L. Semon.

(3.) The right of the Courts of the State of New York to declare the decree of divorce a *nullity*, either as originally entered or as amended, in view of the provisions of the Constitution of the United States, Section 1, Art. IV., and of the Acts of Congress relating to the proof and effect of judgments of one State in other States.

(4.) The right of the Courts of the State of New York to adjudicate that the evidence presented to the North Dakota Court, tending to sustain the adjudication of such North Dakota Court that James L. Semon appeared in the divorce action was insufficient and did not constitute an appearence either in fact or in law and to hold that the adjudication of appearance was erroneous in law.

(5.) All of these questions may be summed up in the question, was full faith and credit given by the Courts of New York to this judgment or judicial proceeding in the Court of North Dakota?

These questions were raised by exceptions duly filed to each and every of the findings of fact and conclusions of law of the Surrogate and to his refusals to find (Transcript, pp. 61 to 64) and by the assignment of errors herein (Transcript, pp. 79, 80).

SPECIFICATION OF ERRORS.

I.

The Surrogate erred in his judgment or decree in adjudicating "that Maude E. Kimball is not the widow of Edward C. Kimball, deceased, and is not entitled as his widow to letters of administration of the goods, chattels and credits which were of Edward C. Kimball deceased" (Transcript, p. 58) and in his conclusion of law to that effect (5th Conclusion, Transcript, p. 57) for the reason *that the decree of divorce granted to Maude E. Semon, now Maude E. Kimball, by the District Court of the fifth judicial district of the State of North Dakota, dated the 26th day of January, 1891, in the action of Maude E. Semon, plaintiff,* vs. *James L. Semon, defendant, dissolving the bonds of matrimony between said Maude E. Semon and James L. Semon, was a good and valid decree and was not void.*" (1st Assignment of Errors, Transcript, p. 79.)

The Surrogate refused so to find when requested by plaintiff in error (Tenth Request, Transcript, p. 60),

to which refusal plaintiff duly excepted (23d Exception, Transcript, p. 63) and like exception was taken to said conclusion of law (14th Exception, Transcript, p. 63).

II.

The Surrogate erred in his judgment or decree in finding as a conclusion of law that the Court of North Dakota did not acquire jurisdiction of James L. Semon, and that the decree of divorce made by said Court was a nullity (First Conclusion, Transcript, p. 56) for the reason *that the said decree of divorce granted by the District Court of the Fifth Judicial District of the State of North Dakota, dated January 26th, 1891, dissolving the bonds of matrimony between James L. Semon and said Maude E. Kimball, therein called Maude E. Semon, was, prior to the amendment thereof and as and in the form and manner in which said decree was originally made, signed, entered, and docketed, a good and valid decree, and was not void, and was binding upon the parties to this proceeding, and that the said Surrogate's Court and other aforesaid Courts in the State of New York erred in not so holding and in not making a decree herein accordingly* (2nd Assignment of Error, Transcript, p. 79). This conclusion of law was duly excepted to by plaintiff in error (Transcript, p. 62, Tenth Exception).

III.

The Surrogate erred in his judgment or decree in finding as a conclusion of law that the Court of North

Dakota did not have jurisdiction to make the order amending said decree of divorce *nunc pro tunc* and that said order was and is a nullity (2nd Conclusion, Transcript, p. 56) for the reason *that the decree of divorce granted by the District Court of the Fifth Judicial District of the State of North Dakota, dated January 26th, 1891, dissolving the bonds of matrimony between James L. Semon and said Maude E. Kimball, in said decree called Maude E. Semon, as amended nunc pro tunc as of the date of its original entry, was a good and valid decree, and the order of said Court, directing said amendment, dated December 16, 1896, was a good and valid order, and the same were not, nor was either of the same, void, and that the said Surrogate's Court and said other Courts in the State of New York erred in not so holding and in not making a decree herein accordingly* (3rd Assignment of Error, Transcript, p. 79). Exception to such conclusion of law was duly taken (11th Exception, Transcript, p. 62).

IV.

The Surrogate erred in his judgment or decree in finding as a matter of fact that said James L. Semon did not appear in said divorce action in person or by attorney and in finding as a conclusion of law that the Court of North Dakota did not acquire jurisdiction of said James L. Semon in said divorce action and that the decree of divorce made by said Court was and is a nullity (4th Finding of Fact, 1st Conclusion of Law, Transcript, pp. 55, 56), for the reason *that the recital and finding in said decree of the said District Court of the Fifth Judicial District of the State of North Dakota,*

that James L. Semon, the defendant in the divorce action, appeared and answered in said action and submitted himself to the jurisdiction of said Court was an adjudication duly made by said Court, and that full faith and credit to such adjudication should have been, but were not, given by the aforesaid Courts in the State of New York in this suit or proceeding and in the final order or decree herein, pursuant to the Constitution of the United States and the Acts of Congress as aforesaid. Exception to such finding of fact was duly taken (5th Exception, Transcript, p. 62). Exception to such conclusion of law was duly taken (10th Exception, Transcript, p. 62).

V.

The Surrogate erred in his judgment or decree in finding as a conclusion of law that plaintiff in error was when she entered into the marriage ceremony with said Edward C. Kimball the wife of James L. Semon and could not and did not contract a lawful marriage with said Edward C. Kimball, and that said plaintiff in error is not the widow of said Edward C. Kimball and not entitled as such widow to letters of administration upon his estate (Conclusions 4th and 5th, Transcript, p. 57), for the reason *that by the force and effect of said decree said Maude E. Semon, now Maude E. Kimball, was not the wife of James L. Semon when she married Edward C. Kimball, and by such marriage she became the lawful wife of Edward C. Kimball, and upon the decease of said Kimball she became his lawful widow* (5th Assignment of Errors, Transcript, p. 80).

That said Surrogate erred in his judgment or decree

VI.

in finding as a matter of fact that the Court of North Dakota did not have the power or jurisdiction to make the order of the 16th day of December, 1896, amending the decree of divorce *nunc pro tunc* (8th Finding of Fact, Transcript, p. 56), and also erred in refusing to find that said decree was duly amended (13th Request to find, Transcript, p. 60), for the reason *that in violation of Section I of Article IV of the Constitution of the United States and of the Acts of Congress relating to the proof and effect of the judicial proceedings of one State in other States, the Courts in the State of New York, to wit, the Surrogate's Court of the County of Kings, in said State, the Appellate Division of the Supreme Court of said State, in the Second Judicial Department, and the Court of Appeals of said State, in the suit or proceeding at bar and in the final order or decree therein did not give full faith and credit to the said decree of divorce nor to said order amending the same, nor to the record and judicial proceedings of the State of North Dakota in the aforesaid action of Maude E. Semon versus James L. Semon, in which said decree or divorce and order were made* (6th Assignment of Error, Transcript, p. 80). The 8th finding was duly excepted to (9th Exception, Transcript, p. 62). The 13th refusal to find was duly excepted to (26th Exception, Transcript, p. 64).

VII.

The Surrogate erred in his judgment or decree in finding as a conclusion of law that the Court of North

Dakota did not acquire jurisdiction of the said James L. Semon in the divorce action and that the decree of divorce made by said Court was a nullity (1st Conclusion, Transcript, p. 56), for the reasons assigned in the VI assignment of errors and printed in italics in specification VI (*supra*). Exception to such finding was duly taken (10th Exception, Transcript, p. 62).

VIII.

The Surrogate erred in his judgment or decree herein in finding as a conclusion of law that the order of the North Dakota Court amending the decree of divorce *nunc pro tunc* was not and is not binding on the defendants in error and did not affect or impair their rights or interest as next of kin of said Edward C. Kimball (3d Conclusion, Transcript, p. 56), for the reasons set out in the II and III assignment of errors herein which assignments are printed in italics in specifications II and III (*supra*). This conclusion was duly excepted to (12th Exception, Transcript, p. 62).

IX.

The Appellate Division of the Supreme Court of the State of New York, for the reasons aforesaid, erred in its judgment affirming the decree of the Surrogate.

X.

The Court of Appeals of the State of New York, for the reasons aforesaid, erred in its judgment affirming the order and judgment of the Appellate Division.

ARGUMENT.

FIRST.

No evidence having been introduced to impeach the facts upon which the District Court of North Dakota acted in adjudging that James L. Semon appeared in the divorce action, it was error for the Surrogate to decree that there was no such appearance, because Section I of Article IV of the Constitution of the United States declares that "full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State."

The full faith and credit referred to means the same faith and credit that a judgment or judicial proceeding has in the State from whence it was taken. Christmas *vs.* Russell, 5 Wall., 302; Hampton *vs.* McConnell, 3 Wheaton, 234; Cheever *vs.* Wilson, 9 Wall., 109.

I.—The record before the Surrogate presents an amended decree in the divorce action which was in existence at the time these proceedings were instituted, and upon the subject of the defendant's appearance the recital therein is as follows: "The defendant having appeared herein and answered and submitted himself to the jurisdiction of the Court." When this amended decree was put in evidence, therefore, it was established presumptively that the Court making the decree had acquired jurisdiction over the defendant by his appearance therein. It was a presumption rebuttable by proper evidence, if such existed, but in the absence of

evidence tending to disprove the assertion of the decree that the defendant had appeared and answered and submitted himself to the jurisdiction of the Court, it was conclusive. It was not attacked by evidence; indeed, *there was no evidence in the Surrogate's Court upon the subject* except the papers which were submitted to the Dakota Court on the motion made by the defendant Semon to amend the decree in respect to the recital referred to. If the judgment, when first entered, had been in the form in which it now is, as respects the recital, no one would have thought of challenging it, certainly not without direct evidence in possession of the attacking party tending to show that there was no appearance. The evidence upon which the North Dakota Court based its decision allowing the amendment was before the Surrogate, and it cannot be said that it does not furnish support for the determination of the North Dakota Court. In granting the order to amend the decree *nunc pro tunc* upon the motion of the defendant in the action, the North Dakota Court necessarily decided what the evidence before it asserted, viz.; that the jurisdictional facts existed at the time the original decree was entered. The motion papers tend to show that such was the fact. It was not then disputed, *nor has it since been questioned by evidence.*

II.—The following discussion of the amendment proceedings, will show that the evidence before the North Dakota Court was an adequate basis for its adjudication on that subject.

The North Dakota Court is a Court of general jurisdiction (Transcript, p. 47, sec. 41, and Transcript, p. 50, secs. 4817-4824, 4825), and had jurisdiction of the person of the plaintiff and of the subject matter of

the divorce action. A decree of divorce in favor of the plaintiff was originally entered therein reciting the service of process upon the defendant without the State of North Dakota and the failure of defendant to appear or answer. Sometime after the entry of this decree the defendant in that action presented a petition to that Court praying that the decree be amended so as to state his appearance. The petition showed that immediately after service of process upon him without the State he had prepared an answer to the complaint without the aid of a lawyer and signed and sworn to the same and had sent the same by mail to the plaintiff's attorneys as required by the terms of the summons served upon him. Annexed to his petition was a copy of the answer, the same being in the form of a letter, attached to which was an affidavit verifying the truth of the same (Transcript, pp. 36 to 40).

The verified answer or letter refers intelligently to the summons and complaint. Its opening sentence is, "In reply to the contents of paper served on me Oct. 15, 1890, by your representative relative to my wife and children."

The summons and complaint was the paper served on Oct. 15, 1890 (Transcript, p. 22).

The letter then takes up the allegations of the complaint *seriatim*. He first replies to the first charge in the complaint, that of desertion, and specifies as to the same that it is one of the matters that the plaintiff, his wife, has sworn to which is untrue, and he states the facts to be that he was ordered from his wife's house and left because he had no other alternative.

He next replies to the second charge in the complaint, that of neglect to provide for the plaintiff, and states that he has always given what he had and that

"my wife swearing that I did not provide for her the common necessaries of life simply tells an untruth."

He next replies to the third charge of the complaint, that of the use of intoxicating liquor, and states that while formerly indulging a little too much he has not tasted it in over a year.

Having thus answered each charge in the complaint he swore to the truth of the answer, and in accordance with the command of the summons to serve a copy of his answer on the plaintiff's attorneys (Transcript, p. 19), he duly mailed the same to them and it was duly received by them (Transcript, p. 33).

This letter or answer was not filed by plaintiff's attorneys, but they caused judgment to be entered in the divorce action reciting the default of the defendant to appear or answer.

The petition of Semon alleges that he sent this answer or letter desiring to appear in the said action and to answer said complaint as required by the summons and with the intention to have said answer presented to the North Dakota Court so as to inform that Court of his defense in the action, and to submit himself to the jurisdiction of the Court, and to have his rights adjudicated without incurring any expense in the matter, and that he believed that said answer would be filed in Court as a part of the proceedings. He further alleged in his petition that he only learned within a few days of the date of his petition (Dec. 1, 1896,) that the answer had not been filed and of the recital of his default in the decree, and also that although plaintiff had remarried since said decree, he was advised by counsel that it would be impossible for him to marry again in view of the recital of his default to appear and of the service of the process in the action upon him without

the State. He, therefore, asked to have the decree amended so as to recite his appearance, to the end that in case of his remarriage it would not be any (apparent) violation of the laws of New York.

With the petition was presented an affidavit of one of plaintiff's attorneys to the effect that he had received the verified letter or answer of defendant as claimed, but had not presented the same to the Court because of the informal nature thereof (Transcript, p. 33). On these papers a motion was made on notice to the plaintiff's attorneys for an amendment of the decree *nunc pro tunc*. The motion was granted and an order made directing that the decree be amended by striking out the recital of defendant's default to appear and answer and by substituting in place thereof the words "the defendant having appeared herein and answered and submitted himself to the jurisdiction of the Court" (Transcript, p. 32), and the decree was amended accordingly (Transcript, p. 41).

The North Dakota Court, therefore, acted upon evidence tending to prove that Semon appeared in the action. That Court was called upon to decide whether or not the facts presented by Semon constituted an appearance. Their determination of the legal effect of Semon's acts cannot be questioned collaterally in the Courts of another State. The facts presented by Semon to establish that he appeared may be impeached *by evidence* in the Courts of another State and upon *new evidence*, if any, tending to show that he did not in fact send the verified letter, or did not in fact do what he alleges he did, a different conclusion might, perhaps, be legitimately reached upon the question of his appearance. No principle or authority, however,

exists which declares that the Courts of one State may, *without new evidence*, treat as void an adjudication of appearance made by a Court of a sister State, where it has any evidence to support it, or may decide, as a matter of law, that the evidence upon which the adjudication was made was insufficient to sustain the judgment of such sister State. On the contrary, both principle and authority declare that full faith and credit must be given to such judgment and that this extends to and covers an adjudication of appearance made upon any evidence, even where the Courts of another State may be of the opinion that such adjudication, on the facts presented to the Court making such adjudication, was erroneous.

In New Lamp Chimney Co. *vs.* Ansonia Brass & Copper Co., 91 U. S., p. 656, this Court said:

"Void proceedings, of course, bind no one not es-
"topped to set up the objection, and in order to estab-
"lish the theory that the proceedings in this case are
"void the plaintiffs deny that the President of the cor-
"poration was authorized to make and file a petition
"in the District Court (McCormack *vs.* Pickering, 4
"Comstock, 279).

"Such a petition might properly be made by the
"President of the company and be by him presented to
"the District Court, if he was thereto duly authorized at
"a legal meeting called for the purpose by a vote of a
"majority of the corporators, and whether he was so
"authorized or not was a question of fact to be deter-
"mined by the District Court to which the petition was
"presented; and the rule in such cases is that if there be
"a total defect of evidence to prove the essential fact,
"and the Court find it, without proof, the action of the
"Court is void, but when the proof exhibited has a legal
"tendency to show a case of jurisdiction, then, although
"the proof may be slight and inconclusive, the action of
"the Court will be valid *until it is set aside by a direct*
"*proceeding for that purpose.* Nor is the distinction un-
"substantial, as in the one case the Court acts without
"authority and the action of the Court is void; but in

"the other, the Court only errs in judgment upon a "question properly before the Court for adjudication, "and, of course, the order or decree of the Court is only "voidable.

"Staples *vs.* Fairchild, 3 Comstock, 46.
"Muller *vs.* Brinckerhoff, 4 Denio, p. 119.
"Voorhis *vs.* Bank, 16 Peters, p. 473.
"Kinnier *vs.* Kinnier, 43 N. Y., 539."

In York vs. Texas, 137 U. S., 15, BREWER, J., speaking for this Court, said:

"The State has full power over remedies and pro- "cedure of its own Courts and can make any order it "pleases in respect thereto, provided the substance of "right is secured without unreasonable burden to parties "and litigants (Antoni *vs.* Greenhow, 107 U. S., 769). "* * * Can it be held that legislation simply for- "bidding the defendant to come into court and challenge "the validity of service upon him in a personal action "without surrendering himself to the jurisdic on of the "Court, but which does not attempt to restrain him from "fully protecting his person his property and his rights "against any attempt to enforce a judgment rendered "without due service of process and, therefore, void, "deprives him of liberty or property within the prohi- "bition of the Fourteenth Amendment? We think "not."

This rule was reiterated and followed in

Kaufman *vs.* Walthers, 138 U. S., 285.
Jones *vs.* Jones, 108 N. Y., 415.

In Jones *vs.* Andrews, 10 Wall., 377, this Court held that an objection to the jurisdiction and to the merits was a voluntary general appearance.

In Cheever *vs.* Wilson, 9 Wallace, 109, the Court said, at page 123, discussing the question of jurisdiction:

"That she did not live in the county where the petition

"was filed is expressly found by the decree. Whether "this finding is conclusive or only *prima facie* sufficient "is a point on which the authorities are not in harmony. "We do not deem it necessary to express an opinion "upon the point. It is clearly sufficient *until overcome* "*by adverse testimony.* None adequate to that result "is found in the record. Giving to what there is the "fullest effect, it only raises a suspicion that *animus* "*manendi* may have been wanting."

In Laing *vs.* Rigney, 160 U. S., 531, this Court quoted with approval the language used in Kinnier *vs.* Kinnier, 45 N. Y., 535, as follows:

"A judgment of a sister State cannot be impeached "by showing irregularities in the form of proceedings "or a non-compliance with some law of the State where "the judgment was rendered relating thereto or that "the decision was erroneous. Jurisdiction confers "power to render the judgment and it will be regarded "as valid and binding until set aside in the Court in "which it is rendered."

This principle was followed in New York in

Dunston *vs.* Higgins, 138 N. Y., 76.
Pendleton *vs.* Weed, 17 N. Y., 72, 75, 79.

SECOND.

There is no hard and fast rule as to what constitutes an appearance in an action.

I.—The Codes of Procedure both in New York and North Dakota make a "voluntary appearance" equivalent to personal service of the summons, but do not define what shall constitute a voluntary appearance (Sec. 4904; Transcript, p. 51).

The North Dakota Court adjudged on the facts here

that there was a voluntary appearance by the defendant Semon. In a somewhat weaker case a New York Court adjudged that an unverified letter written to plaintiff's attorney constituted a voluntary appearance by the defendant.

Pignolet *vs.* Deveau, 2 Hilt., 584.

And see

Quick *vs.* Merrill, 3 Cai., 133 (N. Y.).
Bailey *vs.* Arnold, 9 How. Pr., 445 (N. Y.).

The Encyclopedia of Pleading and Practice, Vol. 1, p. 633, says: "To constitute an appearance any act evincing an intention to appear is sufficient; and that any pleading to the merits by an answer or plea or in any informal manner attacking plaintiff's case is a general appearance (*Id.*, p. 636).

In Brink *vs.* Brink, 8 Kulp., 367, (Com. Pleas, Pa., 1896), a case very much like the case at bar, the Court ordered that the appearance of the defendant domiciled in another State be entered *nunc pro tunc*, after a decree of divorce, when she had in fact appeared *or authorized an appearance.*

What shall constitute a voluntary appearance not having been specified in the Code of Procedure of the State of North Dakota, it was competent for the Court of that State to pass upon the facts presented by Semon and to determine their legal effect.

A study of the Statutes of the State of North Dakota fails to reveal any substantial omission in the document prepared by the defendant Semon as his answer, or failure to observe any substantial requirement of those statutes.

Sec. 4893 (Transcript, p. 50) requires the defendant

to be summoned to serve a copy of his answer on the person whose name is subscribed to the summons.

Unlike the common law writ, the initial process under the modern Code practice is not signed or sealed by the Court or its clerk but consists of a summons signed only by the plaintiff's attorney. In a strictly professional view this process is issued by the Court through the attorney acting as an officer of the Court but to the lay mind it seems only to require an answer to be made to the plaintiff's attorney and not to the Court. Such was evidently the view taken by Semon.

The following references to the Statutes of North Dakota will, however, show that every substantial requirement of the laws of that State as to appearance and answer was complied with by Semon.

Service by mail was proper (Sec. 5329; Transcript, p. 52).

The paper contained all that is required by the Dakota Code in relation to an answer to wit, a denial of the allegations of the complaint. Secs. 4914 & 4924, (Transcript, p. 51) which is the same in terms as Sec. 500 of the N. Y. Code, does not require the answer to contain any title or any prayer for relief, as the learned Surrogate seems to suppose, but only requires the above specified particulars, and the decisions are that an answer or appearance is sufficient, if it intelligently refer to the action in which it is interposed, as it did here.

Didier *vs.* Warner, 1 Code Rep., 42 (N. Y.)

And see

Sec. 5341 North Dakota Code and Sec. 728 N. Y. Code.

The paper was properly verified, and the learned Surrogate is in error in stating that it was not. Section

4922 of the North Dakota Code (Transcript, p. 51) is identical with New York Code, Section 526. The form used by this layman (Semon) has been held by the New York Court of Appeals to be a compliance with the statutes. The words "that it is absolutely true," are equivalent to "true to his knowledge."

Matter of Macauley, 94 N. Y., 574.

And any defect in the verification under the practice in all Code States does not make the pleading a nullity, but objection must be taken to the form of verification which may then be remedied. As the paper was not returned and no notice of any objections was given to Semon there was a waiver of any formal defect. Had any objection been made to the paper, and had notice thereof been given to Semon, he could have remedied the defect within the time to answer. Therefore said defendant Semon, having no notice of any informality, properly, as stated in his petition, (Transcript, p. 37) "believed that said answer so subscribed and sworn to by him and sent to plaintiff's attorneys would be filed in Court as part of the proceedings."

And the North Dakota Code (Sec. 4921, Transcript, p. 51) allows a pleading to be subscribed by the party, as this was.

Again, Section 5341 of North Dakota Code (Transcript, p. 52) provides that it shall not be necessary to entitle an affidavit in an action, but an affidavit made without a title, or with a defective title, shall be as valid and effectual for every purpose as if it were duly entitled, *if it intelligently refer* to the action or proceeding in which it is made." The New York Code contains a similar provision (Sec. 728, N. Y. Code).

And a pleading may be verified by affidavit (Sec.

5281, Transcript, p. 52). And the affidavit may be made out of the State before any person authorized to administer an oath (Sec. 5282, Transcript, p. 52).

II.—The attorney for the plaintiff was in error when he treated this paper as a nullity, and his error cannot make a valid argument against the sufficiency of the paper as an appearance and answer. The North Dakota Court has found by the amended decree that it was a good appearance and answer, and their *judgment* is of more importance than the act of the attorney.

In Laing *vs.* Rigney, 160 U. S., 531, which reversed Rigney *vs.* Rigney, 127 N. Y., 408, the Supreme Court of the United States commented upon the testimony of an expert witness, to the effect that under the practice in the State of New Jersey defendant was not properly served with supplemental process so as to be bound by a decree on a supplemental bill, and said, at page 543: "The opinion of the Chancellor differed from that of the witness, and what is more important, his *judgment* was that under the laws of the State of New Jersey the defendant was in his Court subject to his jurisdiction and bound by its decree."

The attorney said the paper was not in form of a pleading under the requirements of the Statutes of North Dakota (Transcript, p. 33), but the Statutes have been put in evidence here and analyzed above, and we find nothing in them to justify us in treating the conclusion of the Dakota Court that the answer was sufficient as wrong, and the contrary opinion of the attorney as right.

The paper could not mislead as to the intention of the defendant to deny the allegations of the complaint, and to put it in as formal and legal a shape by swearing to it, as it was possible for the defendant, acting without

legal assistance, to do. The learned Surrogate says "it was a mere verified letter," but we think the oath attached to this letter gave it the highest sanctity possible, and evinced unmistakably the intention of the writer to make it as formal and legal as it was possible for the lay mind to conceive. Oaths are used rarely, except in legal proceedings, and verification by oath is the common requirement for pleadings, other than demurrers, under Code practice (Sec. 4921; Transcript p. 51). A seal purports to the lay mind the highest solemnity, and such was evidently the idea of the defendant Semon in adding a seal to his name, and then swearing to the document. First he signed the letter, then he signed the oath and added his seal, and then he made oath to the truth of the contents of the document before a notary public. He probably knew that a paper to be used in Court proceedings must be sworn to. Swearing to the contents of the letter shows most clearly that what he said in his petition is true, to wit: That he prepared and sent said answer "with the intention to have the said "answer presented to this Court, so as to inform the "Court of your petitioner's position and defense in this "action, and to submit himself to the jurisdiction of the "Court herein, and to have his rights adjudicated by this "Court without incurring any expense in the matter" (Transcript, top of p. 37).

THIRD.

The North Dakota Court had power to amend the divorce decree *nunc pro tunc* and proceeded with due regularity in so doing, and its amended decree is binding on the parties and on third persons, including the defendants in error.

Notice of the application to amend the divorce decree was given to the plaintiff's attorneys therein, who admitted that they had duly received the appearance and answer aforesaid, and stated that the original was lost (Transcript, pp. 35 and 33). A copy of a lost paper may be filed. North Dakota Code, sec. 5339. (Transcript, p. 52.) N. Y. Code, sec. 726.

An order was thereupon made by the Court which granted the original decree, *acting through the Judge who signed that decree*, amending the same *nunc pro tunc*, as prayed for, and the amendment was accordingly made on December 16th, 1896, in and upon the face of the original decree.

The following are some of the provisions of the laws of North Dakota bearing upon the power of the Court in the premises: "The law respects form less than substance;" "an interpretation which gives effect is preferred to one which makes void" (Secs. 4715 and 4728; Transcript, p. 50.

"SECTION 4924. In the construction of a pleading "for the purpose of determining its effect, its allegations "shall be liberally construed with a view of substantial "justice between the parties."

"SECTION 4938. The court may, before or after judg- "ment, in furtherance of justice and on such terms as

"may be proper, amend any pleading, process or pro-
"ceeding, by adding or striking out the name of any
"party; or by correcting a mistake in the name of a
"party, or a mistake in any other respect; or by insert-
"ing other allegations material to the case; or when
"the amendment does not change substantially the claim
"or defense, by conforming the pleading or proceeding
"to the facts proved."

"SECTION 4939. The court may, likewise, in its dis-
"cretion, and upon such terms as may be just, allow an
"answer or reply to be made, or other act to be done after
"the time limited by this code or by an order, enlarge
"such time, and may also, in its discretion, and upon
"such terms as may be just, at any time within one year
"after notice thereof, relieve a party from a judgment,
"order, or other proceeding taken against him through
"his mistake, inadvertence, surprise or excusable ne-
"glect, and may supply an omission in any proceed-
"ing; and whenever any proceeding taken by a party
"fails to conform in any respect to the provisions of this
"code the court may, in like manner, and upon like
"terms, permit an amendment of such proceedings, so
"as to make it conformable thereto."

"SECTION 4941. The court shall, in every stage of
"action, disregard any error or defect in the pleadings
"or proceedings which shall not affect the substantial
"rights of the adverse party; and no judgment shall be
"reversed or affected by reason of such error or defect."

(Transcript, p. 51.)

"SECTION 5339. If any process, original pleadings
"or any other paper be lost or withheld by any person,
"the court may authorize a copy thereof to be filed and
"used instead of the original."

(Transcript, p. 52.)

Similar provisions are found in Secs. 723, 724 and 726 of the N. Y. Code. In Viadero *vs.* Viadero, 7 Hun, 313, Mr. Justice DANIELS, speaking of these sections, says: "These provisions are very broad. More comprehensive language could hardly have been selected."

Courts of record have inherent power, independently

of any statutory provisions therefor, to amend mistakes in thei records. Amendments made by Courts having jurisdiction cannot be collaterally attacked.

Pendleton *vs.* Weed, 17 N. Y., 72, 75, 79.
Bohlen *vs.* M. E. R. R. Co., 121 N. Y., 544, 550, 551.
Audubon *vs.* Ex. Ins. Co., 27 N. Y., 216, 221.
Maples *vs.* Mackey, 89 N. Y., 146.
Buckingham *vs.* Dickinson, 54 N. Y., 682.
Dalrymple *vs.* Williams, 63 N. Y., 361, 362.
N. Y. Ice Co. *vs.* N. W. Ins. Co., 23 N. Y., 357, 360, 361.
Delancey *vs.* Pipegras, 73 Hun, 607, 608.
Genet *vs.* D. & H. C. Co., 136 N. Y., 217, 220.

In delivering the opinion of the Court in the Audubon Case, 27 N. Y., at page 221 DENIO, *C. J.*, says:

"*The power to amend results from the jurisdiction* "*of the Court as a Court of record* (Lee *vs.* Curtiss, 17 "Johns., 86; Lansing *vs.* Lansing, 18 *Id.*, 502). In "courts of special and limited jurisdiction, not of record, "this rule is otherwise; and, hence, where a case was "tried before a Justice, without a jury, and he took time "to give judgment, it was held that the action could not "be discontinued, and that the trial was a bar, whether "any judgment was given or not. (Hess *v.* Beckman, "11 Johns., 457.) It is proper to say very distinctly, "in order to prevent misapprehension, that we give no "opinion upon the propriety or abstract legality of the "amendment which was made in the instance before us. "It, no doubt, required very peculiar circumstances to "be shown to render it proper to change the effect of a "judgment rendered upon the merits, upon a summary "application, in the manner pursued in this case. *All*

"that we decide in that respect is, that that Court hav-"ing the power to amend in a proper case, and having "amended this record, the amended judgment is the "only evidence we can receive as to the disposition of "the former action, and that as amended, the judgment "is not a bar to the present action," and that the Court had power to make the amendment *nunc pro tunc* cannot be doubted.

And the power to amend a judgment *nunc pro tunc*, so as to make the record declare the truth, has often been declared. In one of the following cases the amendments were allowed after appeal from the judgment as originally entered; in another after suit brought upon the basis of the original judgment.

Nat. City Bank *vs.* N. Y. Gold Ex. Bk., 97 N. Y., 645.

Toronto Gen. Trust Co. *vs.* C. B. & Q. R. R. Co., 123 N. Y., 37.

Matter of Miller, 70 Hun, 61.

And see Hatch *vs.* Cent. Nat. Bk., 78 N. Y., 487.

Brink *vs.* Brink, *supra.*

Ross *vs.* Hubbell, 1 Caines (N. Y.), p. 112.

The result is that, at a time when, and in a proceeding in which, the Dakota Court had jurisdiction of the parties to, and the subject matter of, the motion to amend the recitals in the original decree, as to whether the defendant had or had not appeared in that action prior to the entry of the decree therein, that Court did decide and enter in the decree in that action, that the defendant had so appeared. This embraced a decision of every question of law and fact involved in that question (Rich *vs.* Rich, 88 Hun, 566). This conclusively settled that, not merely at the time when the motion to

amend was made, nor merely when it was decided, but that prior to that time and at and from the time the defendant's letter to plaintiff's attorneys was received by them, and from then on, including the time when the original decree was entered containing a misrecital of defendant's non-appearance, the defendant had appeared, and that the Court had jurisdiction of his person in that action. This adjudication cannot be collaterally attacked, certainly without evidence that a fraud was perpetrated upon the North Dakota Court.

Laing *vs.* Rigney, *supra.*

Pendleton *vs.* Weed, 17 N. Y., 72, 74, 75, 79.

Lythgoe *vs.* Lythgoe, 75 Hun, 147.

Rich *vs.* Rich, 88 Hun, 566.

FOURTH.

The Surrogate erred in finding as a matter of fact that Semon did not appear in the action (6th assignment of errors, Transcript p. 80).

I.—The Surrogate found as a matter of law that the amendment proceedings were null and void (Transcript, p. 56).

Treating the case, then, *as containing only the original decree,* the amended decree being in his view a nullity, he found as a fact that Semon did not appear in the divorce action (Transcript, p. 53). This was a logical sequence from the false premise that the amendment was void. The Appellate Courts of New York, however, re-

fused to consider the legal conclusion of the Surrogate that the amendment proceeding was void, but put their decision squarely on the ground that the Surrogate had found the fact to be that Semon had not appeared and that as Appellate Courts they could not review a question of fact (Transcript, p. 72, last half; Transcript, p. 85, last half).

In Laing *vs.* Rigney, *supra,* this Court said: "The plaintiff duly excepted to the findings and conclusions, and it is well, settled that exceptions to alleged findings of fact unsupported by evidence present questions of law reviewable in Courts of error."

The Surrogate based his finding of the fact that Semon did not appear in the divorce proceeding on no evidence whatever, but solely upon his conclusion of law above referred to. He said in his opinion: "Moreover I am "of the opinion *upon the undisputed facts* that the "North Dakota Court had no jurisdiction to make the "amendment."

Here, then, we have a case of "*undisputed facts,*" and consequently we have a question of law which the Appellate Courts should have passed upon, but did not, to wit: "Is the amendment proceeding void?"

The Courts of New York recognize in many cases the true rule as expressed in Laing *vs.* Rigney, just referred to, but refused to apply it in the case at bar.

Matter of Green, 153 N. Y., 223.
Matter of Clark, 119 N. Y., 427-433.
Sherman *vs.* R. R. Co., 64 N. Y., 654.

II.—By the eighth of his findings of fact the Surrogate found, expressly and in detail, what the defendant in that action did. He found that the said defendant sent a verified letter to the plaintiff's attorneys in that

action and that said defendant claimed said letter was an answer in that action, and that its sending by him and its receipt by those attorneys was an appearance and answer by him in that action as of the date of its said receipt. He further found that said defendant upon that ground applied to said Court to amend the decree in that action, *nunc pro tunc,* by striking out the recitals in that decree of his non-appearance and failure to answer in that action and by inserting therein a recital that he had appeared and answered therein at the date said letter was so received by said plaintiff's attorneys. He also found that said Court granted said application and amended said decree accordingly. The records of the Court in these proceedings are in the case at p. 32 *et seq.,* of the Transcript.

They were put in evidence before the Surrogate (Transcript, p. 45).

The general finding of the Surrogate that there was no appearance is controlled by these specific findings. Plaintiff in error is entitled to the construction of those findings most favorable to him if they conflict.

Mahl *vs.* Barnum, 116 N. Y., 87.

III.—In view of this condition of the findings and evidence it is clear that the finding that the defendant did not appear in said action, either in person or by attorney, is not a finding of fact, but is a finding of law as to the legal effect of those facts, a mere legal construction of their effect, and if erroneous is reviewable by Courts of Error.

FIFTH.

The contention that the decree of divorce having been amended after intestate's death, the amendment could not affect defendants in error's rights which vested at the time of such death is not well founded.

I.—One fallacy of defendants in error in their contention on this point lies in the assumption it involves, that the jurisdiction of the Dakota Court accrued only when the defendant in the action therein moved to amend the decree of divorce, and that the divorce itself didnot become valid until such amendment was made. The truth is, it accrued when the plaintiff's attorneys in that action received the verified letter sent them by Semon. Such was the decision of the Court by granting the amendment *nunc pro tunc.* From the time of the entry of the decree in the first instance until the amendment of it the decree of divorce was not void, nor the Court without jurisdiction. During that time such decree was only apparently void, by reason of a misrecital on its face, which was amendable. The jurisdiction of the Court depended on the actual facts and law as to the appearance, and not on the erroneus recital in the decree. When those recitals were amended *nunc pro tunc,* the decree was merely made to show on its face what had all the time been the truth, that the Court had jurisdiction, and the decree was valid *ab initio.* In the meantime the misrecitals therein merely affected the effect of the decree as matter of evidence, and not as matter of substance.

Audubon *vs.* Ex. Co., 27 N. Y., 216, 221;
Opinion Denio, *C. J.*
Maples *vs.* Mackey, 89 N. Y., 146.
Produce Bk. *vs.* Morton, 67 N. Y., 199, 202.

II.—The rule of law sought to be invoked has no application to the facts of the case at bar. It applies only to cases in which prior to the amendment being made rights have accrued to some person by reason of his having acted on the faith of the decree as originally entered. The principle is that of estoppel. Defendants in error did no act, and acquired no rights by any act done, on the faith of the decree of divorce. The intestate in whose right alone defendants in error have any standing, did no act on the faith of that decree which makes the doctrine of estoppel applicable. It is found that at the time Kimball married the appellant he knew she was a divorced woman. He married her on the faith of the validity of that decree and not on the faith of its invalidity. To hold it valid, as he assumed it to be, and acted on the faith of it being, violates no rule of estoppel. The only fact giving the defendants in error any rights in the premises is the death of intestate. That was no act at all of defendants in error and it was no act of any one's done on the faith of this decree, either as a valid or invalid one.

III.—Moreover, the rule sought to be invoked applies only to cases in which rights have accrued, not only prior to the amendment and subsequent to the decree, but also to *bona fide* third parties and upon a valuable consideration. Such is not the defendants in error's position. They merely succeed to the intestate's rights and stands on his rights. They parted with nothing on the faith of this decree as unamended. They knew the appellant had been divorced. They were chargeable with intestate's knowledge of that fact. They were put on inquiry. Inquiry of the attorneys for the plaintiff in that action would have disclosed all the facts. In-

quiry of the defendant in that suit would have disclosed them. Defendants in error are neither *bona fide* third parties nor parties who have parted with any consideration.

Sears *v.* Burnham, 17 N. Y., 445, 448, 449.

IV.—Defendants in error are not, likewise, in the position of a creditor who by diligence has acquired a lien, as in the cases cited by their counsel, where amendments of prior proceedings such as would defeat the lien have sometimes been denied. All such cases are cases of specific lien by attachment or execution, to avoid or sustain which amendments were sought. Here no question of title to or lien upon specific property arises. They have no process against or lien upon the decedent's property, but claim by operation of law as next of kin of an intestate. Neither are defendants in error right in claiming that notice to them of the proposed amendment was necessary. Where property is seized under several processes of the Court all claimants are entitled to notice of proposed amendments affecting the validity of any of the proceedings so far as it affects the property levied upon, and such are the cases cited by them. It is difficult to apprehend on what principle they should be called into the North Dakota Court, when it was proposed to amend the decree of divorce, a matter to which they are strangers, and which affects no lien or process of theirs. They were not known to Semon, and it was impossible to give notice to the world at large.

In certain cases *bona fide* purchasers and mortgagees without notice may acquire rights which the Courts will protect in allowing amendments of their record *nunc pro tunc*. But here the next of kin do not claim to have

parted with any value on the faith of the original record of divorce. They simply claim the property of the deceased by operation of law. They, therefore, have no equity which the Court of North Dakota, or this Court, is called upon to protect.

No cases are cited by defendants in error except a line of cases where at the instance of junior judgment creditors prior confessions of judgment have been held invalid as to the former. Such confessions are strictly statutory, and if not strictly regular, are void.

Dunham *vs.* Waterman, 17 N. Y., 9.

V.—Defendants in error claim that they acquired rights which could not be impaired by an amendment of the divorce decree after the death of Mr. Kimball without a hearing, but they had, and have, acquired no such rights. They never had any rights to have plaintiff in error adjudged to be still the wife of Semon. Plaintiff in error, however, has always been, as now, entitled to have the divorce record accord with the fact and show the appearance of Semon in that suit.

VI.—The defendants in error cannot effectually insist that they have any rights which depend for their existence upon the right, if, any, of plaintiff in error to object to the validity of the divorce decree.

Plaintiff in error not only does not object to, but insists upon the validity of that decree. She has no legal right to object thereto.

Rigney *vs.* Rigney, 127 N. Y., 408, 413.
Kinnier *vs.* Kinnier, 45 N. Y., 535, 539.

That the decree was amended only on notice to her attorneys in that action, and not on personal notice to her,

if that be assumed to be the fact, is of no consequence in this action. That motion was based on a petition and an order to show cause which were duly served on said attorneys, and they gave an admission of the service thereof. The order to amend was based on said petition, order to show cause, admission of service, and also on an affidavit made and filed by one of said attorneys for said plaintiff. That order to amend does not say that no one appeared for plaintiff on the motion, but only that no one appeared *in opposition* to the motion. It is perfectly consistent with an appearance without opposition. It is like an appearance in an action and default in answering.

The acceptance and admission of service of the motion papers and the filing of an affidavit was an appearance by those attorneys for plaintiff on that motion, even though they did not appear in opposition to it. Such appearance was presumptively authorized by her. No evidence whatever was offered or given herein to prove that such appearance for her was unauthorized by her. The finding that the order was made on default, is not a finding that it was made on default of appearance without due service of notice, but is merely a finding of such a default as the order itself recites to wit, a default in opposition.

The plaintiff in that action is the plaintiff in error herein. She does not dispute that said appearance was authorized and is in this proceeding claiming the benefit of the order based upon it. Not only is there an utter absence of any proof of want of authority to appear, but, if there were, the acts of plaintiff are a ratification of the appearance equally effectual as original authority would have been.

The appearance so made cannot be collaterally attacked.

Matter of Stillwell, 139 N. Y., 337, 340, 341.
Brown *vs.* Nichols, 42 N. Y., 26.
Denton *vs.* Noyes, 6 Johns., 296.

SIXTH.

Irregularities, if any, do not affect the validity of the divorce decree as amended.

The Surrogate was of opinion that if the letter was regarded as a pleading, then an issue was raised which entitled the defendant to a trial (Transcript, p. 54).

That is true. The defendant raised an issue and was entitled to a trial thereof upon notice, but he was not given the notice to which he was entitled. He answered the complaint on October 23d, 1890, and never heard any more about the suit until December, 1896, when he learned that a decree of divorce had been entered reciting his default. He did not desire after the lapse of the six years since the filing of his answer to proceed with the trial of the issues, but, as the conditions had changed, he desired the fact of his appearance in the suit to be stated, and the decree thus made of such effect as that he could remarry. He alleges in his petition that his former wife, the plaintiff in error, had again married and that he was advised that he could not remarry if it appeared that he had not appeared in the divorce action (Transcript, p. 37). Under the decisions in New York a conviction for bigamy is upheld against one marrying a second time where not actually appearing, or served

with process within the State, in a divorce action brought by a former spouse.

People *vs.* Baker, 76 N. Y., 78.

The trial of the issues might have been insisted upon by the defendant, but he waived that and only asked the Court to amend its record as stated. This waiver of trial, six years after raising the issues, was not remarkable, and the right of defendant to so waive his rights cannot be doubted. The Court would have granted a trial, no doubt, had he demanded it in his petition, but he did not, and demanded only the amendment actually made.

Even if the proceedings of the North Dakota Court were irregular as to trial of issues, or otherwise, which we deny, the irregularity could not avail in a collateral proceeding, as it is only for *want of jurisdiction* that the divorce decree can be so attacked.

Laing *vs.* Rigney, 160 U. S., 531 (quotation *supra,* p. 24).

Gunn *vs.* Plant, 94 U. S., 664.

SEVENTH.

There is no warrant in the pleadings or evidence herein for any attack upon the good faith of the parties to the divorce proceedings.

The Surrogate's finding, Fifth, to the effect that petitioner went to North Dakota for the purpose of procuring the divorce, has absolutely no evidence to support it..

I.—There is absolutely no fact proven in the case at bar which justifies the remarks of counsel for defendants' in error as to those matters. The decree of divorce recites the *bona fide* residence of petitioner in North Dakota, and it is admitted that she was living in that State from June 5th, 1890, to February 5th, 1891, a period of eight months; and what longer time she lived there does not appear. We were asked by defendants' in error to admit that petitioner was living in North Dakota between those dates, and we so admitted; but that admission does not exclude her having lived there before or after the dates mentioned.

In the McGowan case cited below by defendants' in error, question of domicile was raised *by the husband*, who claimed that he was not bound by the North Dakota decree, and proofs were adduced. Ninety days' residence is all that is required by the laws of North Dakota, and the plaintiff in error was there for at least eight months. When third parties attack by proceedings in this State a divorce decree of a foreign jurisdiction, the Court of Appeals holds that the determination of the foreign Court as to residence or domicile of a person actually within its jurisdiction cannot be successfully assailed.

Kinnier *vs.* Kinnier, 45 N. Y., 535-540.

The *bona fides* of plaintiff in error's eight months' residence is not attacked here *by any proof whatever.*

This being so, the Court is bound to assume on the evidence, as well as under the authorities, that plaintiff in error was a *bona fide* resident of North Dakota.

II.—Another innuendo, without evidence to support it, which counsel for the defendants' in error endeavored

to make much of, is that the story that Semon ever sent the letter referred to in the amendment proceedings is untrue. This he bases, first, on the fact that the letter is addressed to "Herman Winterer" one of plaintiff's attorneys and not to "Winterer & Winterer," plaintiff's attorneys. We could have met any evidence that the letter was not such as it purported to be, and could have satisfactorily explained how it came to be addressed as above. The fact is that the summons and complaint were bound in a cover containing a printed endorsement of the name of "Herman Winterer" along with his address, and that Semon took the name and address from that.

Secondly, counsel for defendants' in error claims, that Semon, and the attorney Winterer, must have stretched their consciences in order to swear that the copy of the letter produced in the amendment proceedings was an exact copy of a letter purporting to have been sent six years before. As remarked before, had attack by evidence been made upon the good faith of the proceeding for amendment, we could have shown the facts. Semon may have preserved a copy of his letter. The plaintiff in error saw the letter when it was received by her attorney, Mr. Winterer. The Notary who took the affidavit in 1890 is living in New York, and he could have been called to prove the truth of the verification *had any attack been made.*

III.—Counsel for defendants' in error likewise lays stress upon the strong criticism of the good faith of the amendment proceedings made in the Appellate Division opinion, to wit: "The story of his appearance and answer is apocryphal and challenges credulity and the Surrogate appears to have been of this opinion."

There being no evidence to challenge the veracity of Mr. Semon, and the defendants' in error having made no attack before the Surrogate upon the good faith of the amendment proceedings, we regard the sentence quoted above as the most remarkable language ever appearing in a judicial opinion. The Surrogate's opinion as expressed in his findings is that (Transcript, p. 56, Finding 8), "Semon applied to the Court to have a letter which HE SENT to the plaintiff's attorney after receiving the summons in the divorce suit filed *nunc pro tunc.*"

The opinion of the Surrogate, as well as the above finding, is also entirely at variance with any idea that he did not believe that Semon sent the letter. His opinion discusses the letter *only as actually sent.* He says:

"The letter which is in evidence and referred to as "constituting the appearance of the defendant is not "in any sense or upon any theory of practice an appear- "ance in the suit. It is not entitled, is improperly veri- "fied, contains no demand for relief, and does not even "contain any intimation of any intention on the part "of the defendant to appear and submit himself to the "jurisdiction of the Court. It is a mere verified letter "and nothing more.

"But, if it has any force whatever in the suit, it is a "pleading which raises an issue which entitled the de- "fendant to a trial upon some sort of notice to him. "The record does not show any such notice."

There is, therefore, absolutely no ground for saying that the Surrogate did not believe the story. The Court of Appeals in the majority opinion treat the letter as actually sent. They inserted the letter *in extenso* in their opinion (Transcript, p. 84), and discussed the alleged legal defects therein. They threw no doubts upon its history as claimed by Semon.

Chief Justice PARKER in the ~~discussing~~ dissenting opinion refers

to this attempt to discredit the unchallenged evidence as follows:

"But the motion to amend the judgment, made by "the defendant in that action after the death of the "intestate, Kimball, seems to have aroused suspicion "that there was some collusion between Semon and his "former wife and that his action was taken for her bene- "fit, and not for his own, as he swears. There is, how- "ever, no proof that this suspicion is well founded, but "if it were otherwise it could not affect the question "before us, which is whether the Dakota Court had "before it competent evidence upon which to base the "determination that it had jurisdiction of the defendant "Semon at the time of the entry of the judgment, and "authority to amend the decree as of that date, so that "it should show such jurisdiction. The evidence upon "which the Court based its decision allowing the amend- "ment is before us, and it cannot be said that it does "not furnish support for the determination of the Court.

"The defendant Semon, who undertook to answer in "that action within the time mentioned in the summons "and subsequently insisted upon such an amendment of "the decree as should recite the fact of his submission "to the jurisdiction of the Court, does not challenge its "jurisdiction. That is attempted by a third party, "who produces no other evidence than that submitted "by Semon to the Court in his petition praying for such "an amendment as should recite the jurisdictional facts "which existed when the decree was first made. *No "prior case can be found where it has been held that in "such a situation an adjudication of personal appear- "ance can be disregarded, when collaterally attacked "by a third party, and the Court, of its own head, hold "otherwise.*"

EIGHTH.

The defendants in error having admitted the ceremonial marriage of the petitioner to Edward C. Kimball, the deceased, the burden is upon them to prove that the marriage was not valid.

The presumption in favor of the validity of an actual ceremonial marriage is one of the strongest known to the law (Schmisseur vs. Beatric, 147 Ill., 210), and the burden is with the party attacking such validity.

Bishop on Marriage and Divorce, Secs. 457. 458.

1 Greenl. Ev., Sec. 33, 35.

The occurrence of the second marriage also brings into existence the presumption that the parties to it are innocent of the crime of bigamy or adultery.

Johnson *vs.* Johnson, 114 Ill., 611.

1 Bishop Mar., Div. & Sep., Ed. 1891, Secs. 949-955.

Rather than hold a second marriage invalid, and that the parties have committed a crime or been guilty of immorality, the Courts have often indulged in the presumption, where the absent party is shown to be alive, that such absent party has procured a divorce.

It is not enough to impeach the validity of a marriage to show that one of the spouses has a husband or wife still living. The presumption that the former marriage has been legally dissolved must be overcome.

Wenning *vs.* Teeple (Ind. Sup.), 41 N. E., 600.

This presumption, expressed in the maxim "*semper pro matrimonio*" is universally recognized. Every inducement of the law leans to matrimony. When a marriage has been shown in evidence, whether regular or irregular, and whatever the form of the proofs, the law raises a strong presumption of its legality;—not only casting the burden of proof on the party objecting, but requiring him throughout, in every particular, to make plain, against the constant pressure of this presumption, the truth of law and fact that it is illegal and void. And the strength of the presumption increases with the lapse of time through which the parties are cohabiting as husband and wife. It being for the highest good of the parties, of the children, and of the community, that all intercourse between the sexes in form matrimonial should be such in fact;—the law, when administered by enlightened judges, seizes upon all probabilities, and presses into its service all things else which can help it, in each particular case, to sustain the marriage, and repel the conclusion of unlawful commerce.

Bishop, Mar. & Div., Sec. 956.

NINTH.

The foregoing argument has been confined to a discussion of the effect of the decree of the North Dakota Court *as amended*.

This argument will, however, be accompanied by a separate and special brief of associate counsel devoted wholly to the consideration of the effect of the decree of that Court *as it was originally entered*.

The extraordinary importance of the question of the extra-territorial effect of divorces obtained by constructive service is, we submit, sufficient for treating that point in a separate brief.

TENTH.

We respectfully submit that the decree of the Surrogate's Court should be reversed with costs.

WALDEGRAVE HARLOCK,
GEORGE BELL,
For Plaintiff in Error.

Scott v. Morlock for P. G.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

Filed Feb. 25, 1899.

MAUDE E. KIMBALL,
Plaintiff in Error,

against

HARRIET A. KIMBALL, JOHN S. JAMES and HARRIET L. JAMES,
Defendants in Error.

No. 946.

In Error to the Surrogate's Court of the County of Kings, State of New York.

BRIEF FOR PLAINTIFF IN ERROR.

HENRY W. SCOTT,
WALDEGRAVE HADDOCK,
For Plaintiff in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1898.

MAUDE E. KIMBALL,
Plaintiff in Error,

vs.

HARRIET A. KIMBALL, JOHN S. JAMES and HARRIET I. JAMES.

No. 248.

IN ERROR TO THE SURROGATE'S COURT OF THE COUNTY OF KINGS, STATE OF NEW YORK.

Statement.

A separate brief filed in this case by Waldegrave Harlock and George Bell, for the plaintiff in error, presents a full statement of the facts, specifications and assignments of error, including a full and exhaustive argument upon all the points of law in the case save and except the one discussed in this brief, to which we refer as if the same were incorporated in full herein.

The question we here raise is that under Article 4, Section 1, of the Constitution of the United States, and the Act of Congress of May 26, 1790, and other Acts and Statutes based thereon, the judgment of the lower

Court should be reversed, and the rights of the plaintiff in error under the law as the widow of Edward C. Kimball should be recognized and fully protected.

Article 4, Section 1, reads:

> "Full faith and credit shall be given in each "State to the public acts, records and judicial pro- "ceedings of every other State. And the Congress "may by general laws prescribe the manner in "which such acts, records and proceedings shall be "proved and the effect thereof."

See 1 Statute at Large, 122.

The plaintff in error was married to her first husband, James L. Semon, on the 12th day of May, 1885, and on the 26th day of January, 1891, was divorced from him by a Court of competent jurisdiction in the State of North Dakota, and subsequently on the 29th day of June, 1895, was married to Edward C. Kimball, who died about November, 1896. As his widow she was entitled to administration of his estate and her interest therein as such widow under the laws of the State of New York. The Courts of the said State of New York refused to give full faith and credit to the said decree of divorce of the said plaintiff in error, and in consequence found that she was not the widow of deceased and not entitled to any rights whatever as such.

The additional facts necessary to present the point are included in the argument.

ARGUMENT.

The essential points for argument may be classified in the outset as follows:

1. The divorce granted to the plaintiff in error divorcing her from her first husband, James L. Semon, was valid and under Article 4, section 1, of the Constitution of the United States was entitled to full faith and credit in the State of New York—the same faith and credit, the same force and effect that it had or would have had in case it had been challenged in the State of North Dakota, where it was granted.

2. The amendment of the decree was a judicial proceeding within Article 4, section 1, of the Constitution and the judgment and decree as amended was entitled to full faith and credit in the State of New York as provided in said article.

The second proposition is argued at length in a separate brief, and there is no ground upon which the judgment of the Courts in New York can stand even though the doctrine laid down in that State obtains in this Court, for under the amendment the defendant in the action in Dakota appeared and technically the case comes within the New York rule. While in the argument of the broad doctrine and in our contention that the rule of law in such cases established in New York is not only in violation of the express commands of the Constitution, and an arbitrary disregard of State amity, but a rule that can neither be sustained nor justified upon grounds of public policy, common justice or legal reasoning, we do not wish to be understood as waiving in any degree our contention that the amendment of the decree in the North Dakota court brings the case within the technical rule in New York as before stated and as argued in detail, and entitles us to a reversal of the cause as aforesaid.

We wish to unreservedly claim, however, upon the record in this cause that on the 26th day of January, 1891, James L. Semon and Maude E. Semon, now Maude E. Kimball, the plaintiff in error herein, ceased to be husband and wife, in virtue of a decree of absolute divorce granted to the said Maude E. Kimball in that suit in the State of North Dakota in the manner and form as set forth in the transcript of the record. Semon was a resident of New York and his wife was a resident of North Dakota. Lawful service was had and the decree was awarded in full conformity to and in compliance with the laws of that State. This is not denied. It is only claimed that Semon did not appear, and for the purpose of argument in this point of our brief, that he did not appear will be admitted. No further proof that this decree of divorce is a nullity was required by the New York Courts save and except the fact that the defendant was not personally served in the State of North Dakota or did not voluntarily appear in the action, and further that he was a resident or citizen of the State of New York.

These facts appearing and the Court finds that the solemn judgment of the Court of a sister State is a nullity! The judgment a nullity? Where is it a nullity? Everywhere, according to the sweeping decision of the Surrogate. It is not even permitted to stand in Dakota. It is a nullity, says the Surrogate, in disregard of State amity, the Constitution and laws of the United States, public policy, justice and reason, to say nothing of the sacred claims to wifehood and moral virtue of this plaintiff in error.

It is unnecessary to go into the decisions of the State of New York to any great degree at this time on this question. It is sufficient to say that the following cases, and others as well, established the rule in New York that where the defendant was not personally served in the State in which the decree was rendered, and did not voluntarily appear in the action, and was a citizen of said State of New York, that such decree had no force or effect therein, to wit: Kinnier *v.* Kinnier, 45 New York,

535; Ferguson *v.* Crawford *et al.*, 70 New York, 253; Kerr *v.* Kerr, 41 N. Y., 272; McGown *v.* McGown, 19 Appellate Division (N. Y.), 368; O'Dea *v.* O'Dea, 101 New York, 23; People *v.* Baker, 76 New York, 78, 82; Cross *v.* Cross, 108 New York, 628; Williams *v.* Williams, 130 New York, 193; Bell *v.* Bell, 4 Appellate Division (N. Y.), 527; Atherton *v.* Atherton, 82 Hun, 179.

But no case has gone to the extent of declaring the decree itself a nullity, as the Surrogate does in this cause.

It is to challenge this doctrine as invoked in this case as well that we appeal to this Court for relief. The learned Justice, writing the opinion states that "it will "not be claimed that the judgment as originally entered "was valid. It recited the service of summons outside "of the State; that the defendant had not answered, de- "murred, or in any manner appeared in the action. The "defendant was a resident of this (New York) State, "and the Courts of Dakota had never acquired juris- "diction of his person so as to have the power to order "a judgment *in personam* against him. It is only upon "the theory that he served an answer in that case, there- "by submitting himself to the jurisdiction of that Court, "that it can be claimed that the Courts of that State ac- "quired jurisdiction to grant a final judgment against "him."

The opinion then goes on to discuss the amendment feature under which we claim the defendant did appear which is not material at this point.

It will be observed from this language that a federal question is here squarely involved and that the highest Courts of New York uphold a rule that declares the divorce of the plaintiff in error herein an absolute nullity. Not only are divorces granted in North Dakota disregarded in New York but divorces in every State in the Union where personal service on voluntary appearance is not had as aforesaid. Still in that State divorces are continually granted on constructive service or service outside of that State under the statutes that are precisely the same. In other words the Courts of New

York refuse to recognize judgments of divorce granted in other States, obtained in pursuance of its precedents and statutes exactly similar in character to those in the said State of New York.

The absurdity of such a rule can best be illustrated by citing the case of Davis *v.* Davis, 2 Miscellaneous Reports (New York), 549. Justice Pryor, however, who decided this case cleared his conscience as best he could and arraigned the absurd doctrine so vigorously, notwithstanding, as an inferior tribunal, he had to pronounce such a judgment as to entirely exculpate himself from criticism.

This case of Davis *v.* Davis was an action to annul a marriage. In a suit by defendant against a former wife in a Massachusetts Court he obtained a decree of divorce on the ground of desertion on constructive service. The decree was challenged as a nullity for want of personal service, and of an appearance by the defendant therein. The sole ground upon which the case was considered was the alleged defect of jurisdiction in the Court of Massachusetts, for the reasons above stated, the other conditions it was held being settled on the authority of the case of Kinnier *v.* Kinnier, 45 New York, 535.

Justice Pryor, in delivering the opinion thus strikingly and potently arraigns the inconsistency of such a proceeding:

"As the marriage purporting to be dissolved was "not celebrated in Massachusetts; as the defendant in "the divorce suit was not domiciled in that commonwealth "nor was served with process there, nor appeared in "the action, it results that by the law of New York the "judgment against her is of no effect; that she is still "the wife of the defendant, and that by necessary conse-"quence his marriage with this plaintiff is a nullity.

"*To this conclusion I am compelled; but I am not "forbidden to say that my reason revolts against it.* "By the law of Massachusetts its Court had jurisdiction "of the defendant in the divorce suit, and the decree of "divorce is valid and conclusive. By virtue of the su-"preme law of the nation, 'a decree in divorce valid and

"effectual by the laws of the State where obtained is "valid and effectual in all other States' (Cheever *v.* "Wilson, 9 Wall., 109); yet I am to declare this Massa- "chusetts judgment a nullity. And why? *Because* "*the jurisdiction of the Massachusetts Court rests solely* "*on a constructive service of process by publication,* "*and by the law of New York such service is of no* "*avail. But such constructive service is the only foun-* "*dation of the jurisdiction of this Court in the present* "*case, yet by the law of New York such service gives jur-* "*isdiction to its Court, and the judgment I am to render* "*is not only valid, but of so transcendant an efficacy as* "*to impeach the records and cancel the judicial pro-* "*ceedings of another State. In reason such services of* "*process should be sufficient in both States or in neither.*

"Equally anomalous will be the effect of the judg- "ment of this Court on the relation and rights of the "parties. In Massachusetts, not the former spouse, but "this plaintiff, is the lawful wife of the defendant; while "in New York the former spouse is still the wife of the "defendant, and his connection with the plaintiff is a "crime. Indeed, relying on the nullity of the Massa- "chusetts decree, the former wife has instituted here an "action for divorce from the defendant, on the allega- "tion that his marriage with this plaintiff is an adulter- "ous association. The Executive of New York may de- "mand from Massachusetts the rendition of the defend- "ant as a bigamist, but can he be a bigamist whom "Massachusetts had released from a former marriage?

"*The absurd and mischievous consequences of the* "*present judgment do not relieve me from the necessity* "*of pronouncing it; but, perhaps, the exposition of* "*them may not be amiss in the prevalent agitation for* "*a uniform system of marriage and divorce.*"

Were we disposed to use forcible language in setting forth the extraordinary results likely to follow an inexorable enforcement of the rule referred to, our courage would fail us in the face of the words of Mr. Justice Pryor. We are quite content to refrain from a further discussion of the question or an expression of approval or disapproval, as to the wisdom of giving judicial sanction to a rule of law that is absolutely indefensible.

To sum up the whole controversy, it simply amounts to this: That the plaintiff in error, on account of the mistreatment and cruelty of her husband, left him and settled in another State, and while resident there invoked the laws on the subject of divorce. This is done in every part of the United States, and the practice has arisen on account of the deplorable condition of these laws as a whole. Such conflicts as those appearing in the present case will continue unabated until some uniform system of laws upon the subject of divorce or marriage and divorce is enacted. The plaintiff in error is not responsible for the law in either State and it would not be right to say that a citizen of the United States is not entitled to avail himself or herself of the laws of the land as the plaintiff in error did in the State of North Dakota as shown by the record in this case. Thus we are forced to contend for the universal rule that a divorce good where granted is good everywhere, and a marriage in pursuance thereof and valid where solemnized is valid everywhere, rather than to submit to one that is purely local and when applied universally or to the test of reason and the law terminates in hopelessly untenable and absurd results.

Another observation. The Courts of New York say that the Courts of another State shall not adjudge the *status* of citizens of that State. The word *status* as applied to citizens of New York and the universal rule governing the subject of marriage and divorce is a misnomer. It means nothing. The term is misapplied. Hearing and determination of a legal controversy in a divorce action or any other is not adjudging the status of the parties to such suit or suits as citizens. Adjudging the marriage status or dissolving the marriage bond or determining any other legal controversy between the parties does not involve their status in the sense applied. A divorce cause is an action *in rem*, and the Courts of the State in which the *res* or *rem* is situated if we may be pardoned for thus applying the terms, has jurisdiction absolutely to fully adjudicate all questions concerning it.

Such Court obtains jurisdiction in virtue of having the plaintiff in the action and the subject matter lawfully in Court and it is immaterial so far as a dissolution of the marriage bond is concerned whether the defendant in such an action is in Court or not. The marriage bond being dissolved by the release of the plaintiff from its obligations leaves the defendant free also, for the plaintiff is no longer bound or tied to him because of such release. It may satisfy a Court or a defendant to say that the defendant in such a case is not affected by the decree, but the fact remains that a Court of competent jurisdiction has released the plaintiff and therefore it is impossible in reason or rationality for the plaintiff to still be bound to a condition from which the Courts and the law of a soverign State has "unbound" him. Such precedents in a State are the result of a local sentiment which upholds a Court in making such decisions and Courts may unconsciously err on the side of a supposed moral question

This discussion does not uphold persons who act fraudulently in obtaining divorces any more than fraud or imposition in any other proceeding would be upheld but we do say that it is not right for the Courts of the State of New York or any other State to establish a rule of law designed for the purpose of taking in those who act fraudulently and in such a drag-net victimize hundreds if not thousands of innocent persons. There is no more reason or sense in violating the law and the Constitution in cases of this character in order to prevent a person who had practiced fraud and imposition in another State from enjoying the fruits of it in New York and at the same time victimizing countless hundreds of innocent persons than there would be in violating the law and the Constitution in an attempt to prevent a murderer from going unwhipped of justice because under the provisions of the Constitution and laws in virtue of some technicality he would be entitled to his liberty, and in preventing such an alleged miscarriage of justice establish a rule of law that would send a thousand innocent men to the gallows.

The rule in New York and in some other States works great hardships in many directions. To say nothing of the demoralizing conditions brought about in regard to the marriage status, the property interests and the legitimacy of the offspring is brought in question. In a State where decrees of divorce are accorded full faith and credit the children of subsequent marriages are held legitimate, and their property rights fully recognized, and the widow awarded her statutory or dower interests in the estate of her deceased husband, while in others, in New York for instance, the same children would be held to be bastards and the widow a concubine. Under Art. 4, Sec. 1, of the Constitution, it is said that full faith and credit shall be given to judgments of other States. There is no qualification in this article. It must either be said that a decree or judgment of divorce is not a judgment or judicial proceeding or if it is conceded to be a judgment or judicial proceeding with any efficacy whatever, it must be given the same faith and credit that it has in the State in which it was rendered.

This plaintiff in error is one of the innocent victims of this kind of law. The record may be searched in vain for a single fact or a single legal reason for denying full faith and credit to this decree of divorce except that the defendant, Semon, did not appear in the Dakota Court.

There is no contention that the laws and statutes of Dakota were not fully complied with nor that there was any fraud in the proceedings from beginning to end; nor that any of the recitals in the original decree are not conclusive in law as against the world unless attacked in the forum in which the judgment was rendered. In fact nothing was urged against the decree except as above stated. In Cheever *v.* Wilson, 9 Wallace, 109, it is held that "where the record shows that the wife was a resident of Indiana for the length of time required by its laws before commencing an action for divorce the Courts of Indiana have jurisdiction, and the judgment will be given full force and effect in the other States."

In the same case, page 123, it was also held:

"That she did live in the county where the petition "was filed, is expressly found by the decree. Whether "this finding is conclusive or only *prima facie* sufficient, "is a point on which the authorities are not in harmony.

"We do not deem it necessary to express an opinion "upon the point. *It is clearly sufficient until overcome "by adverse testimony. None adequate to that result is "found in the record.* Giving to what there is the fullest "effect it only raises a suspicion that the *animus man-"endi* may have been wanting. * * *

"The proceedings for divorce may be instituted where "the wife has her domicile. The place of the marriage, "of the offence, and *the domicile of the husband* are of "no consequence."

2 Story on the Constitution, §1313; D'Arcy *v.* Ketchum, 11 Howard, 175; Christmas *v.* Russell, 5 Wallace, 302; McDonald *v.* Smalley, 1 Peters, 620; Ditson *v.* Ditson, 4 Rhode Island, 87; Barber *v.* Barber, 21 Howard, 582.

If constructive service is of no avail, then the domicile of the husband would be of all importance, and unless he chose to appear a valid decree could only be obtained in the courts of his domicile, which the above language positively denies. And if he did appear the decrees might be challenged as collusive.

Would the Court say that his domicile was of no consequence if a decree could not be obtained elsewhere except by his consent? And being obtained by his consent say that the same was not collusive?

Article VI. of the Constitution says:

"This Constitution and the laws of the United States "which shall be made in pursuance thereof, and all "treaties made or which shall be made under the au-"thority of the United States, shall be the supreme law "of the land, and the Judges in every State shall be "bound thereby, anything in the Constitution or laws "of any State to the contrary notwithstanding."

The decisions of the Supreme Court of the United States are equally the supreme law of the land and binding on the Courts of every State as against any local rule or statute.

In Ennis v. Smith, 55 U. S., at page 400, this language is used:

"The presumption of law is that the domicile of "origin is retained until residence elsewhere has been "shown by him who alleges change of it. *But residence "elsewhere repels the presumption and casts upon him "who denies it to be a domicile of choice the burden of "disproving it.*"

Declarations of domicile have always been received as proof in England, France and the United States (see cases cited in note 1, 55 U. S., page 400). Reference to the record will show that nowhere did defendants introduce one word of testimony or evidence of any kind in opposition to the validity of the decree. They did not call a witness or present a document. Neither in the pleadings nor on the trial was a scintilla of evidence produced by defendant on the question of the residence of the plaintiff, even if that question would have been a proper subject of inquiry.

The evidence of the plaintiff in error is true and stands undenied and unimpeached, that she went to North Dakota with the intention of becoming a *bona fide* resident, and did reside there as found in the decree.

The findings in the decree show that she was a resident in good faith for the length of time required by the law of North Dakota before the commencement of the action.

In every case in the State courts even where residence has been sucessfully attacked, it has been shown that the person had left material interests or possessions or business in the State of original domicile which were supposed to keep up the domicile.

In this case it is not shown that the defendant had a dollar's worth of real or personal property or any other tie to bind her in the State of New York or elsewhere during her residence in Dakota.

In Pollock *v.* Pollock, 58 N. W. Rep., 176, it was held that the plaintiff's uncontradicted testimony that he settled in Dakota for the purpose of becoming a resident there, and that it had been his home since his arrival until the trial, is sufficient to justify a finding that he was a *bona fide* resident.

In case of Coulborn *v.* Coulborn, a Michigan case, referred to by the Court in 5 N. Y. Supplement, at page 94, *the Court went so far as to find that where plaintiff sought employment in Michigan and left no ties in the State of his former residence, that a bona fide residence was obtained even though he testified that his main purpose in going to Michigan was to obtain a divorce.*

Kent's Commentaries, page 346, Vol. I., give out the doctrine that it was sufficient to give jurisdiction to the Federal Court that a citizen had really and not merely nominally removed to another State, though his motive might have been to prosecute an action in the United States Court. It was sufficient that the plaintiff was in fact a citizen of one State and defendant of another. The motive of removal was not to be inquired into (see *cases cited*). If the question of motive cannot affect rights of a citizen to maintain actions in the Federal Courts, it is difficult to see how it can create disability when applied to State Courts.

This is a point worth thinking about. Imagine the spectacle of a United States Circuit Court in California finding that a United States Circuit Court in the State of New York had no jurisdiction over a cause in which a final judgment had been ordered in the latter State in said Court for the reason that the Court in California had retried the question of the alleged citizenship of the plaintiff in New York and had found that said Court had erred in its finding.

"*It would be sufficient answer to the questions as to "the validity of the decree that no such issue is made in "the pleadings. If he wished to assail the decree he "should have stated clearly the grounds of objection on "which he proposed to rely.*" Cheever *v.* Wilson, 9 Wall., 122.

A special plea in bar of a suit on a judgment in another State to be valid must deny by positive averments every fact which would go to show that the Court in another State had jurisdiction of the person or of the subject matter. Kent's Commentaries, Vol. I., page 281, and Vol. II., page 95, note and cases cited.

The decree of a sister State can be attacked for lack of jurisdiction only where it is shown that there was usurpation of jurisdiction, but not for fraud, error nor negligence. Kent's Comment., Vol. II., page 121 (14th edition), cases cited in note.

This Court has laid down as a universal principle that when power or jurisdiction is delegated to any public officer or tribunal over a subject matter and its exercise is confined to their discussion, the acts so done are binding as to the subject matter and individual rights will not be disturbed, collaterally for anything done in that discretion within the authority and power conferred. The only question which can arise between an individual claiming rights under the acts done and the public or any person denying their validity are power in the officer or fraud in the party. U. S. *v.* Arredondo, 6 Peters, 691; Voorhees *v.* Bank of U. S., 10 Peters, 475; Wilcox *v.* Jackson, 13 Peters, 511; Shriver's Lessee *v.* Lynn, 2 How., 59, 60; Hickey's Lessee *v.* Stewart, 3 How., 762; Williamson *v.* Berry, 8 How., 546.

We must repeat that this decree is not challenged for any of these reasons, but we have made the points thus briefly in this connection in anticipation of any claim of that kind in this Court by our opponents, and for the further reason that we feel in view of the thousands of persons throughout the entire country who are affected in one way or another by a local rule in some State of the Union, and the general doctrine being fairly in the case and in view of future litigation between the parties hereto, that the Court should declare itself as was done in the case of Cheever *v.* Wilson (see page 122), so that expensive litigation may be avoided and also some relief afforded from the continual aggressions in many

States in cases of this character in violation of Article 4, Section 1, of the Constitution.

We hope that the Court will go as fully into the entire questions referred to in the briefs as the record in this case will warrant.

The writer has long advocated a uniform law upon the subject of divorce, and the very basis of that contention has been that divorces granted in a State in full compliance with its laws, whether the defendant was in Court by personal service or voluntary appearance or only summoned constructively, are valid and binding and entitled under Article 4, Section 1, of the Constitution, to full faith and credit in every other State. A State cannot in violation of the Constitution and laws establish a rule that is a law unto itself. The remedy should come through plain, adequate and unmistakable legislation, within the Constitution.

Thus we have presented the iniquity of this conflict of jurisdictions and local State rules upon this subject, and now come back to the fundamental law that must govern in the end this as well as all cases of like character.

Article 4, Section 1, of the Constitution of the United States, reads:

"Full faith and credit shall be given in each State "to the public acts, records and judicial proceedings of "every other State. And the Congress may by general "laws prescribe the manner in which such acts, records "and proceedings shall be proved and the effect thereof."

See also 1 Stat. at Large, 122.

On the 26th day of May, 1790, Congress enacted that "*the records and judicial proceedings should have faith* "*and credit given to them in every Court within the* "*United States as they have by law or usage in the* "*Courts of the State from whence such records are or* "*shall be taken.*" From that day until this there has never been any question raised against a judgment regularly obtained in one State when enforcement was at-

tempted in any other State in the Union, excepting judgments for divorce. While it is true that when a judgment is void in the State in which it is obtained, it is void in any other State, yet, there are only certain known methods of attacking the validity of them. Such judgments and decrees must either be void on their face or it must be clearly shown that they are void for the reason that they were not rendered in accordance with the laws of the State in which they were obtained. It is not proper for the Court of a sister State to enter into a trial of the facts upon which a judgment or judicial proceeding of a sister State is based. For instance, if the judgment of such sister State solemnly finds that an applicant for a divorce has resided for a given period of time in good faith in such State, and such fact is found from the evidence in the case, it is clearly incompetent for the Courts of a sister State to retry that question of fact. If false testimony has been admitted and the Court imposed upon, that question must be determined in the forum in which the judgment was rendered, on a proper application to vacate it, but in this case no such proof was offered. These rules are so well known that it is useless to cite specific authority in support of them. The Constitution of the United States provides that full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State, and that the citizens in each State shall be entitled to all the privileges and immunities of citizens of the several States, and that all persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State in which they reside.

The individual, as well as the State, can demand full credit and faith to proceedings that affect him, and a full vindication of his rights. A judgment in divorce, granted in one State to a *bona fide* resident, according to the law of that State, must be given full faith and credit in any other State, though it may not be granted on grounds recognized in such other State.

Divorce is a rightful subject of legislation in the various States and Territories. It does not come within the designation of common law and chancery jurisdiction. It is neither civil nor criminal. It is *sui generis*. It was formerly the subject of ecclesiastical jurisdiction.

In this country it is entirely the creation of statute, and, while marriage may be solemnized by authority of the church, the dissolution is entirely with such Courts as may be designated by the lawmaking power of the jurisdiction, or, unless prohibited by the Constitution, the lawmaking power itself may dissolve the marriage. Prior to 1857, the subject of divorce in England belonged to the Ecclesiastical Courts and to Parliament. In 1857, Chapter 85, Statutes 20 and 21, Vict., gave exclusive jurisdiction in all matrimonial cases to the Court of divorce and matrimonial causes, but now such matters are heard in the divorce and probate division of the high Court of Justice, with the right of appeal.

In our own country, divorces have frequently been granted by the State Legislature. We have a record of one granted in the Territory of Oregon in 1852, which was upheld by the United States Supreme Court, in the case of Maynard *versus* Hill. It has been done in the State of Connecticut and other States of the Union.

When the Court of a sister State solemnly declares by its judgment, that under the law of that State a husband and wife are lawfully divorced, it is then lawful for them to remarry, and it is a well settled rule of law that when the marriage is valid in the *lex loci contractus* it is valid everywhere. In divorce cases a period of residence of the plaintiff is required, but in marriage it is not so. Marriage can be contracted anywhere at a moment's notice according to the laws of the *lex loci* and in many States of the Union and, in fact, in all of them unless an express statute forbids, the Courts uphold marriage by consent as at common law.

As early as 1813 Justice Story, construed the act of Congress heretofore cited and the Constitution of the

United States in the case of Mills *v.* Duryee, 7 Cranch, 481, holding that a judgment obtained in one State is conclusive in all others, and that such a judgment has the same effect in every other State that it had in the State in which it was obtained. In commenting upon this case Justice Story declared that the intent of the provision of the Constitution of the United States and the act of Congress was to give conclusive effect to such judgments.

Chief Justice Marshall, in Hampton *v.* McConnell, 3 Wheaton, 234, affirms the doctrine above referred to.

In that case it was held:

"A judgment of the State Courts should have the "same credit, validity and effect, in every other Court in "the United States, which it had in the State where it "was pronounced, and that whatever pleas would be good "to the suit thereon in such State and none others, could "be pleaded in any other Court in the United States."

The Supreme Court of the United States to the present day has followed the decisions of Chief Justice Marshall and Justice Story in a long unbroken line of decisions.

In Cheever *v.* Wilson, 9 Wallace, 123, this Court as before stated upholds a decree of divorce awarded in Indiana. In that case it was held that the petition laid the proper foundation for the subsequent proceedings and warranted the exercise of the authority which was invoked (divorce). It contained all the necessary averments. The Court was the proper one before which to bring the suit. It had jurisdiction over the parties and the subject-matter. The decree was valid and effectual according to the law and adjudication in Indiana. The Constitution and laws of the United States gave the decree the same effect elsewhere that it had in Indiana. If a judgment is conclusive in the State Court wherein it is rendered, it is unquestionably conclusive everywhere in the Courts of the United States.

The case of Cheely *v.* Clayton, 110 U. S., 705, opinion by Justice Gray, decided a case involving the

validity of a decree of divorce obtained in the Territory of Colorado before that State was admitted into the Union. The following language which applies precisely to the general doctrine we contend for in the case under consideration is used:

"The Courts of the State of the domicile of the parties "doubtless have jurisdiction to decree a divorce in ac- "cordance with its laws without regard to the place of "the marriage, or to that of the commission of the of- "fense for which a divorce is granted; and a divorce so "obtained is valid everywhere. If a wife is living apart "from her husband without sufficient cause, his domi- "cile is in law her domicile, and in the absence of any "proof of fraud or misconduct on his part, a divorce ob- "tained by him in the State of his domicile after reason- "able notice to her either by *personal service* or *publica- "tion* in accordance with its laws is valid, although she "never resided in that State.

"But in order to make the divorce valid, either in "the State in which it is granted or in another State, "there must, unless the defendant appeared in the suit "have been such notice to her as the law of the first "State requires. Citing Story Conflict of Laws, §230*a;* "Cheever *v.* Wilson, 9 Wallace, 108; Harvey *v.* Farnie, "8 App. Cas., 43. Also Burlen *v.* Shannon, 115 Mass., "438; Hunt *v.* Hunt, 72 New York, 218."

This case alone is decisive of this cause. The element of constructive service arises and it is hard to conceive how the Courts of New York can refuse to recognize the decree herein in the force of such an imperative declaration of the law by this Court. To thus refuse is a species of State egotism that cannot be justified from any point of view.

Section 2579 of the Territorial Code now section 2755 of the Civil Code of North Dakota provides that "in actions for divorce the presumption of law that the "domicile of the husband is the domicile of the wife does "not apply. After separation, each party may have a "separate domicile, depending upon proof upon actual "residence and not upon legal presumptions." (See Transcript of Record, page 49.)

There is no contention, and never has been as before stated, that the decree in this case was not granted and obtained in full compliance with the laws of the State of North Dakota.

The defendant in this action had the right to invoke the laws on the subject of divorce after she had established her residence, and, as a resident, she had the right to institute an action for a divorce. So it will be observed that the case of Cheely *v.* Clayton is in point as clearly for the benefit of a wife as for the benefit of a husband. According to the decree, the defendant in this action, James L. Semon, had committed a matrimonial breach, and the wife, therefore, had a right to take up a domicile independent of his, and an adjudication of the marital status was a proper subject of jurisdiction in that Court, and when that Court dissolved it no marriage tie or bond remained for the Court of New York to take jurisdiction on, to pretend to disregard.

In Cheever *versus* Wilson, above cited, this precise point is referred to in the following manner:

"It is insisted that Cheever never resided in Indiana; "that the domicile of the husband is the wife's, and that "she cannot have a different one from his. The con- "verse of the latter proposition is so well settled it "would be idle to discuss it. The rule is that she can "acquire a separate domicile whenever it is necessary or "proper for her to do so. The right springs from the "necessity for its exercise, and endures as long as the "necessity continues. The proceeding for a divorce "may be instituted where the wife has her domicile. "The place of the marriage, of the offense and the domi- "cile of the husband are of no consequence."

The later case of Cheely *versus* Clayton, above referred to, holds that the plaintiff in an action is only required to give such notice to the defendant as the law of the State in which the action is instituted requires.

Vol. 2, Black on Judgment, 822, referring to this subject uses the following language:

"In America it is generally held, and indeed almost

"universally, that as proceedings in divorce is intended "to effect the status of the parties and is, therefore, "essentially in *rem.*, the judgment pronounced, whether "in a foreign country or state, by a Court having lawful "jurisdiction of the cause, and in the absence of fraud, "is valid and binding everywhere, and in all subsequent "controversies, provided the applicant was *bano fide* "domiciled within the territorial jurisdiction of the "Court, although the other party being a non-resident, "was notified only by advertisement or some other species "of constructive service." Citing Pennoyer *v.* Neff, 95 U. S., 714; Roth *v.* Roth, 104 Ill., 35; Ditson *v.* Ditson, 4 R. I., 87; Tolen *v.* Tolen, 2 Blackf., 407; Burlen *v.* Shannon, 115 Mass., 438; Hood *v.* Hood, 110 Mass., 463; Wright *v.* Wright, 24 Mich., 180; Harding *v.* Alden, 9 Me., 140; Rush *v.* Rush, 46 Iowa, 648.

See also 2 Bishop, Marriage and Divorce, §§ 155-164; also Black on Judgments, Vol. 2, §§ 925-933.

See also Brown on Jurisdiction, §§ 76, 77, citing Gelpcke *v.* City of Dubuque, 1 Wall., 206; Thompson *v.* State, 28 Ala., 17; Richmond *v.* Smith, 15 Wall., 438; Kline *v.* Kline, 57 Iowa, 386; Wall *v.* Williamson, 11 Ala., 826; Fellows *v.* Fellows, 8 N. H., 160; Turner *v.* Turner, 44 Ala., 437; Hood *v.* Hood, 11 Allen, 196; Beard *v.* Beard, 21 Md., 321; Shreck *v.* Shreck, 32 Tex., 578; Shafer *v.* Bushnell, 24 Wis., 372, and numerous others (somewhere) referred to in the brief.

Black on Judgments, Vol. 2, Section 932, says:

"So now the rule may be regarded as settled by the "great preponderance of authority that a decree of di-"vorce pronounced by a competent Court in favor of a "*bona fide* domiciled citizen of the State and against a "non-resident, where service of process was made upon "reasonable constructive notice, and in the absence of "any fraud or collusion is valid and binding both in "that State and in all other States." Citing Pennoyer v. Neff, 95 U. S., 714, 734, from which he quotes copiously from the opinion of Justice Field in that case upholding squarely the doctrine we herein contend for.

See also State *v.* Schlachter, Phill. (N. Car.), 520;

Hull *v.* Hull, 2 Stroph, 174; Cooley Const. Lim., 401 and Note; 2 Kent Comm., 110; Cook *v.* Cook, 56 Wis., 195; Gould *v.* Crow, 57 Mo., 200; Wakefield *v.* Ives, 35 Iowa, 238; Wilcox *v.* Wilcox, 10 Ind., 436; Mansfield *v.* McIntyre, 10 Ohio, 28.

Under this fourth article and first section of the Constitution and the Act of May 26, 1790, if a judgment has the effect of record evidence in the Courts of the State from which it is taken, it has the same effect in the Courts of every other State, and the plea of *nil debet* is not a good plea on action brought upon such judgment in a Court of another State. Mills *v.* Duryee, 7 Cranch, 483; 2 Cond. Rep. 578. See Leland *v.* Wilkinson, 6 Peters, 317; U. S. *v.* Johns, 4 Dall, 412; Ferguson *v.* Harwood, 7 Cranch, 408; 2 Cond. Rep., 548; Drummond's Admr's *v.* Margruder's Trustees, 9 Cranch , 122; 3 Cond. Rep., 303.

In an action upon a judgment, in another State, the defendant cannot plead any fact in bar which contradicts the record on which the suit is brought. Field *v.* Gibbs, Peters C. C. R., 155. See Green *v.* Sarmiento, Peters C. C. R., 74; Blount *v.* Darrah, 4 Wash. C. C. R., 657; Turner *v.* Waddington, 3 Wash. C. C. R., 126.

In Christmas *v.* Russell, 5 Wall., 302, the Court say:

"When the question of the construction of that act "of Congress was first presented to this Court it was "argued that the act provided only for the admission of "such records as evidence; that it did not declare their "effect; but the Court refused to adopt the proposition, "and held, as the act expressly declares, that the record, "when duly authenticated, shall have in every other "Court of the United States the same faith and credit "as it has in the State Court from whence it was taken."

Where the jurisdiction has attached the judgment is conclusive for all purposes, and is not open to any inquiry upon the merits—citing 2 Story on Const (3rd Ed.) § 1313 which declares that "if a judgment is con- "clusive in the State where it is pronounced, it is equally "conclusive everywhere."

Nearly all of the States hold that a divorce decree of another State rendered on publication service that is valid in the State where rendered will be valid in the State where presented. In some of these cases, however, the question of jurisdiction in the State granting the divorce was not contested when the record was offered. Hull *v.* Hull, 2 Storbh. Eq., 174; Thompson *v.* State, 28 Ala., 12; Thompson *v.* Thompson, 11 L. R. A., 443, 92 Ala., 545; Van Orsdal *v.* Van Orsdal, 67 Iowa, 35; Wakefield *v.* Ives, 35 Iowa, 238; Harding *v.* Alden, 9 Me., 140, 23 Am. Dec., 549; Loker *v.* Gerald, (Mass.), 16 L. R. A., 497.

Rendleman *v.* Rendleman, 118 Ill., 257, holds that the Court will be presumed to have jurisdiction.

Hawkins *v.* Ragsdale, 80 Ky., 353, 44 Am. Rep., 483, that a divorce decree of another State on publication service bars dower in Kentucky.

But in Mansfield *v.* McIntyre, 10 Ohio, 28, a decree of a Kentucky Court on publication service was held not to bar dower in Ohio, as the Ohio statutes applied only to divorces rendered in Ohio and the Kentucky decree was somewhat imperfect, although it is conceded without question that the marriage bond was dissolved.

In Burlen *v.* Shannon, 115 Mass., 438, the decree was sustained under the Massachusetts statute providing for the validity of foreign divorce.

Waldo *v.* Waldo, 52 Mich., 94, squarely holds that the record cannot be impeached collaterally which shows an appearance.

In Gould *v.* Crow, 57 Mo., 200, there was no effort to impeach the decree, the contest being over the jurisdiction of the Court of Common Pleas Courts of Indiana, but it was conceded that the decree was entitled to full force and credit under the Constitution.

So in Hunt *v.* Hunt, 72 N. Y., 217, 28 Am. Rep., 129, affirming 9 Hun, 622, the divorce was upheld on the ground that the Court of the other State had jurisdiction of the subject-matter and of the persons, and this though the defendant was not personally served or

did not voluntarily appear but was only served by substitution services.

In *re* Morrison, 52 Hun, 102, the plaintiff lived in Ohio, the cause occurred in Ohio, and was a good cause for a divorce in New York, and it was held that the heirs of plaintiff could not assail the Ohio divorce.

In Cooper *v.* Cooper, 7 Ohio, Pt. 2, p. 238, no grounds were shown against the Indiana divorce decree in the Ohio Court, and it was upheld under Art. 4, section 1, of the Constitution.

In Shafer *v.* Bushnell, 24 Wisconsin, 372, the cause occurred in Wisconsin and was ground for divorce there, and a divorce obtained in another State by publication was sustained in Wisconsin through comity.

In State *v.* Schlachter, 61 N. C., 520, a divorce obtained by a wife while the husband was (in the army) in New York, where she was domiciled, was upheld in a criminal proceeding in North Carolina for living in adultery after the wife had married in New York and then come to North Carolina with her second husband. This case is sometimes cited as overruling Irby *v.* Wilson, 21 N. C., 568, and in a suit for divorce the defendant must answer the charge that he had falsely sworn in another State in order to procure a divorce on publication that complainant's residence was unknown, unless he shows that perjury was punishable in that State so as to excuse meeting that part of the bill of complaint. Fairchild *v.* Fairchild, 43 N. J. Eq., 473.

See Ohio cases not heretofore cited, McGill *v.* Deming, 44 Ohio State, 449; Doerr *v.* Forsythe, administratrix, 50 Ohio State, 726; Graves *v.* Graves, 50 Ohio State, 196.

The opinion in the case of Felt *v.* Felt, 40 Atlantic Reporter, 436, recently decided (May, 1898), the Court of Chancery of the State of New Jersey discusses this question very ably, referring to the precedents in that State, and also severely criticising the New York rule.

In this case it appeared that a husband, being a domi-

ciled resident of Utah, brought suit in a Court of that Territory against his wife, residing in New Jersey, for divorce, on the ground of desertion, and served her personally in New Jersey with a copy of his complaint and summons. She made no appearance or defense, and, after more than two months from such service, default was entered against her; and, upon proofs produced to the Court, a decree of divorce was granted. It was held that such decree was a defense to a suit by the wife against the husband for divorce in New Jersey.

We quote from the opinion:

"The whole subject is discussed by Mr. Bishop in the "second volume of his recent treatise on Marriage, Di- "vorce and Separation (sections 1-152, inclusive, and "particularly sections 142-152). In the earlier sections "of that volume he calls attention to the distinction be- "tween jurisdiction for the purpose of a pecuniary de- "cree against the person, and jurisdiction for the pur- "pose of declaring a *status;* holds, with Chancellor Za- "briskie, that a suit for divorce is a proceeding *in rem;* "and shows that a decree of divorce may be valid for "the purpose of ending a marriage *status,* while it "would not be valid for the purpose of enforcing a per- "sonal decree for alimony in the foreign jurisdiction. "This distinction has not always been kept in mind. "The New York cases referred to, as I read them, go "upon the basis that the marriage *status* may be held "to have come to an end in the State in which the decree "is declared, and still exist in all the other States of "the Union. I confess I am unable to see how that "solution of the difficulty accords with reason. If one "State in the Union has power to declare, and in a suit "brought by one spouse against the other, in which the "best notice practicable has been given to that other, "does declare, upon grounds recognized by civilized men "to be sufficient, that a once husband is no longer a hus- "band, and has no wife, I do not see how it can be held "in any other State that such person is still the husband "of his former wife, and that she is still his wife. More- "over, such a doctrine seems to me to be contrary to pub-

"lic policy. Its noxious tendency was well exemplified "in the leading New York case of People *v.* Baker (76 "N. Y., 78). There the defendant, Baker, while liv- "ing in New York, had been sued by his former wife, in "Ohio, for divorce and a decree of divorce rendered "against him, based upon substituted service. Relying "upon that decree, he contracted a marriage in New "York, was indicted for bigamy, based on such second "marriage, and convicted and sentenced to State's "Prison. We have not here to deal with a case where "the ground of the divorce, as found by the foreign tri- "bunal, was frivolous, or not in accordance with recog- "nized principles underlying the marriage state, or "with a case where any imposition, fraud or conceal- "ment was practiced upon either court or party. On "the contrary, actual notice was given, and time to ap- "pear and defend allowed. Nor is it alleged that the "wife was for any cause unable to defend, or that she "had a defense which she now seeks to set up. We are "bound to presume that the finding of the Court of Utah "was based upon sufficient and unassailable evidence. "Hence it appears that no injustice was done the wife. "I find nothing in our own decisions which contra- "venes the result at which I have arrived, and I think "that it is fully sustained by the reasoning of Chief "Justice Beasley in Doughty *v.* Doughty (28 N. J. Eq., "586). The decree of the Court of Chancery granting "a divorce in that case which was somewhat similar to "this, was sustained, on appeal, distinctly on the ground "that the decree of the State of Illinois there set up as "a defense was not a decree in a suit for divorce, but "was one in a suit of jactitation of marriage, and also "on the ground that notice of it failed to reach the de- "fendant, by reason of designed neglect on the part of "the plaintiff in the foreign decree to take proper pains "to give her actual notice. The learned Chief Justice, "in dealing with the question, distinctly declared that "it would be necessary for our Courts, on the ground of "comity, to recognize the validity of foreign divorces, "obtained by substituted service, upon fair proceedings "and proper grounds, against residents of this State. "He held that as our system provided for the procura- "tion of divorces against absent spouses, and expected

"every foreign jurisdiction to recognize the validity of "such divorces, we must accord the same validity to the "foreign divorces obtained under the same circum- "stances. But the present case is within the authority "of the recent decision of Vice-Chancellor Reed in Ma- "gowan *v.* Magowan ([N. J. Ch.] 39 Atl., 364). There "the wife sued the husband for maintenance, and he "pleaded a decree of divorce granted by the Court of "the Territory of Oklahoma, and the decree in that case "recited that Magowan was a resident of that Territory. "The wife, in answer to it, replied that he was not a "resident of that Territory; that he had imposed upon "the Court in that respect. But the learned Vice-Chan- "cellor held that the recital in the decree was conclusive "against the defendant in that suit, who had notice of it. "That case goes much further than it is necessary to go "here, because here it is an admitted fact in the case that "the husband was a *bona fide* resident domiciled in the "Territory of Utah at the time the suit was brought and "for more than a year prior thereto. I will advise a "decree in favor of the defendant."

In Kinnier *v.* Kinnier, 45 New York, 535, 542, it is held:

"A judgment of a sister State cannot be impeached by "showing irregularities in the form of proceedings or a "non-compliance with some law of the State where the "judgment was rendered relating thereto, or that the de- "cision was erroneous. Jurisdiction confers power to "render the judgment, and it will be regarded as valid "and binding until set aside in the Court in which it is "rendered."

This language was quoted in Laing *v.* Rigney, 160 U. S., 531, by the Court in the opinion. This is a strong case and practically declares that the forum wherein a judgment is rendered is the place to attack the same unless it is absolutely void. It is an unheard of doctrine to declare the judgment of the Court of a sister State a nullity without direct allegations and proof sufficient in law to show that the same is absolutely void. There is not a single direct allegation made by defendants in error challenging the validity of the decree in this case except as stated that service was constructive. The ad-

mitted residence of the plaintiff in error confers jurisdiction over the plaintiff in that suit and over the *rem* or *res* without the slightest question, and this Court cannot under its own precedents for almost a century do anything but reverse the judgment in this cause. Particularly are the cases of *Cheever* v. *Wilson, Cheely* v. *Clayton,* and *Pennoyer* v. *Neff,* directly in point and must control the Court in this case.

The ridiculous attitude taken by the New York Courts should be sufficiently rebuked so that they will take notice of the law as declared by the highest Court in the land, as they have continued to disregard the decision of this Court in Cheely *v.* Clayton, and have followed the old precedents and have recently gone farther than ever, holding in the case of McGown *v.* McGown, 19 Appellate Division, 368, that the plaintiff (wife) who was divorced in North Dakota in full compliance with the laws of that State, and subsequently married there to another man, the defendant (husband) being constructively served was guilty of adultery and granted the defendant in that suit an absolute divorce in an action in New York, awarded him the custody of the minor child and refused to permit the mother to even see the child for about one year and one-half, absolutely ignoring the universal principle that a marriage valid where contracted, is valid everywhere. The lower Court in this same case announced the amazing conclusion that this woman had one husband in Dakota and another one in New York. We do not mean to criticise the intermediate Courts for they must follow the precedents of the Court of Appeals. We hope, therefore, that this Court will declare the law in terms so plain and unmistakable that the highest Court of that State will recede from its present indefensible and inexcusable position on this question.

There is the further question touched on lightly in the discussion of the Cheever *v.* Wilson case that is not in this case, but we do not feel like closing this portion of our brief without making a few observations upon it,—thinking perhaps the Court may in reviewing the various

points that may arise, take it up for consideration incidentally if not directly. The proposition we refer to is whether the Courts of another State can re-try the findings on recitals of fact in a decree of divorce upon the question of the residence of the plaintiff. The statutes upon residence are uniform in many of the States, except as to the length of time of residence required before an action for divorce can be instituted. This is one of the facts to be proved on the trial. The Court granting the decree hears and determines the evidence on this point, and if judgment of divorce is to be awarded, finds that the plaintiff was a *bona fide* resident of the county, and had been a resident in good faith of the State for the period required by statute at the time of the commencement of the action. The Courts of some of the States in collateral proceedings re-try this question of fact and often find that the Court of such other State granting the decree erred in its findings and judgment, and declare the same null and void. In this manner the jurisdiction is impeached and the judicial proceedings of a sister State are canceled. A case that may be cited by our opponents is that of Thompson *v.* Whitman, 18 Wallace, 457. This was a case arising under a statute in New Jersey, providing that in the event of certain violations of the fishery or oyster laws, that two justices of the peace of the county in which the trangressions of the statute occurred could punish the offenders and confiscate their property. This was done, and an action was instituted in the United States Court by the parties for damages, and the findings and judgment of these justices were offered as a defense, and the Court instructed the jury that the same was not conclusive only *prima facie* evidence of the facts therein recited. The jury found that the alleged violation of the law occurred in a county other than that in which the parties were tried and in view of this fact the Court declared that the justices acted without jurisdiction. We do not think this case is parallel or in any degree meets the point suggested in divorce actions. In Thompson *v.* Whitman, the case turns on geographical location. The act com-

plained of occurred in another county, and this being true there was no evidence whatever to sustain the judgment. There was a total want of evidence. In this other class of cases it is a question of the weight of the evidence. The Court of the State granting the decree, says the evidence as to residence is sufficient. The Court of another State retries the question and declares the evidence to have been insufficient. If this view should prevail, a judgment of divorce never could become final. The jurisdictional facts could be attacked in every State of the Union, even after years had elapsed. Again, this finding of the Court rendering the decree confers jurisdiction *eo instanti* over the plaintiff and over the *status res* or subject matter of the action, and an adjudication thereon is final and conclusive, unless appealed from or unless proper application is made in the same forum to va ate the judgment. If an attack were made on the jurisdiction and the fact established that the divorce action was tried and determined in a county or State other than those recited in the decree, then the case of Thompson *v.* Whitman, would be in point.

There was a total want of evidence in this case while in the class we refer to there is always evidence in a greater or less degree to sustain the judgment of the Court and it is not within the power of the Courts of another State to retry this question when once determined and to find that error of judgment was committed, and that the proceedings are a nullity. We have a case in this Court sustaining the view of the law here expressed. In the case of the New Lamp Chimney Co. *v.* Ansonia Brass Co., 91 United States, 659-660, it is held:

"Such a petition might properly be made by the presi-
"dent of the company, and be by him presented to the
"District Court, if he was thereto duly authorized at a
"legal meeting called for the purpose by a vote of the
"majority of the corporators; and whether he was so
"authorized or not was a question of fact to be deter-
"mined by the District Court to which the petition was
"presented; and the rule in such cases is, that if there

"be a total defect of evidence to prove the essential fact, "and the Court find it without proof, the action of the "Court is void; but when the proof submitted has a legal "tendency to show a case of jurisdiction, then, although "the proof may be slight and inconclusive, the action of "the Court will be valid until it is set aside by a direct "proceeding for that purpose. Nor is the distinction "unsubstantial, as in the one case the Court acts with-"out authority, and the action of the Court is void; but "in the other the Court only errs in judgment upon a "question properly before the Court for adjudication, "and of course the order or decree of the Court is only "voidable." Staples *v.* Fairchild, 3 Comst., 46; Miller *v.* Brinkerhoff, 4 Den., 119; Vorhees *v.* Bank, 10 Pet., 473; Kinnier *v.* Kinnier, 45 N. Y., 539.

Referring to the case of D'Arcy *v.* Ketchum, 11 Howard, 165, the Court in Thompson *v.* Whitman, 18 Wallace, 465, says:

"In that case it was held by this Court that the judg-"ment was void as to the defendant not served, and that "the law of New York could not make it valid outside of "that State; that the constitutional provision and act of "Congress giving full faith, credit and effect to the judg-"ments of each State in every other State do not refer to "judgments rendered by a Court having no jurisdic-"tion of the parties; that the mischief intended to be "remedied was not only the inconvenience of retrying a "cause which had once been fairly tried by a competent "tribunal, but also the uncertainty and confusion that "prevailed in England and this country as to the credit "and effect which should be given to foreign judgments, "some Courts holding that they should be conclusive of "the matters adjudged, and others that they should be "regarded as only *prima facie* binding. But this uncer-"tainty and confusion related only to valid judgments; "that is, to judgments rendered in a cause in which the "Court had jurisdiction of the parties and cause, *or (as "might have been added) in proceedings in rem, where "the Court had jurisdiction of the res.* No effect was "ever given by any Court to a judgment rendered by a "tribunal which had not such jurisdiction."

It is unnecessary to add that taking these two cases, viz.: Thompson *v.* Whitman and the New Lamp Chim-

ney Co. *v.* Ansonia Brass Co. together and bearing in mind the proposition we submit and the distinction between the cases that the precedents of this Court are fully in line with our theory of the law and that the conclusion that must be reached by the Court is that the findings of the Court of a sister State upon questions of fact are conclusive.

The same legal principle and the same line of reasoning governs in this class of cases as prevailed in the international question that arose in the case of Martin Koska, a naturalized citizen of the United States, who, in 1848, went from this country to Austria to make preparations to bring his family over here, and while in Trieste was arrested by the Austrian Government under the claim or pretence that he owed military service to the Austrian Government, he having been born an Austrian citizen.

His release was demanded by the United States officers on the ground that he was an American citizen, and the answer of the Austrian Government was that he was born a subject of the Emperor of Austria and the privilege of changing his allegiance did not vest in him but vested in his government, and that this privilege had not been granted by the Austrian Government. The demand for his release was made by Capt. Ingraham of the United States sloop of war *St. Louis*, at the instigation of the proper officers of this government and Koska's release was effected.

The better opinion appears to be these days that, the right to change citizenship rests with the individual and not with the government, and the good faith thereof must be questioned, if at all, in the place where residence or citizenship is transferred; and so in the same manner the right of a wife to select her domicile separate and apart from her husband upon sufficient cause, rests with her and not upon the narrow restrictions and burdens imposed by the common law of a wife's domicile being that of her husband, irrespective of her wishes or enlightened legislation on the subject.

It seems proper that there should be a fixed and uniform rule on this subject and the social conditions of

the country would be ameliorated, much misery and anguish would be averted, and much fraud and perjury would cease. It seems right that one should know when and where one's motives, good faith, residence and citizenship would be safe from attack, and when and where one could rest secure in the constitutional guarantee of one's country.

We submit in conclusion that the judgment of the Court below should be reversed upon the grounds that, an affirmance thereof would be against the interests of the people and public policy.

As heretofore suggested it has been a subject of much discussion and deep interest to the legal profession and the citizens of the different States, to obtain if possible a uniform system of divorce laws. The divers laws of the different States are so utterly in conflict with each other as to often leave a citizen in grave doubts as to whether he is a married man with all the responsibilities attached thereto, or a single man, enabled under the law to repudiate a woman who may in good faith have joined him in marriage.

It is respectfully submitted, that a condition of affairs wherein one would be married in a given State, divorced in another, and a bigamist in another, all upon exactly the same state of facts and arising from the same transaction, is contrary to the public policy of the country and should not be tolerated by the United States or the the Courts thereof.

We submit in view of the premises and the law of the land that the judgment of the lower Court should be reversed and the cause remitted for further proceedings.

Respectfully submitted,

HENRY W. SCOTT,
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For Plaintiff in Error.

No. 248.

Bf. of Arnold for D. E. (mo.)

Filed Mar. 22, 1898.

IN THE

Supreme Court of the United States.

MAUDE E. KIMBALL,

Plaintiff in Error,

vs.

HARRIET A. KIMBALL, JOHN S. JAMES and HARRIET I. JAMES,

Defendants in Error.

Brief for Defendants in Error on Motion to dismiss Writ of Error and Papers on which the Motion is made.

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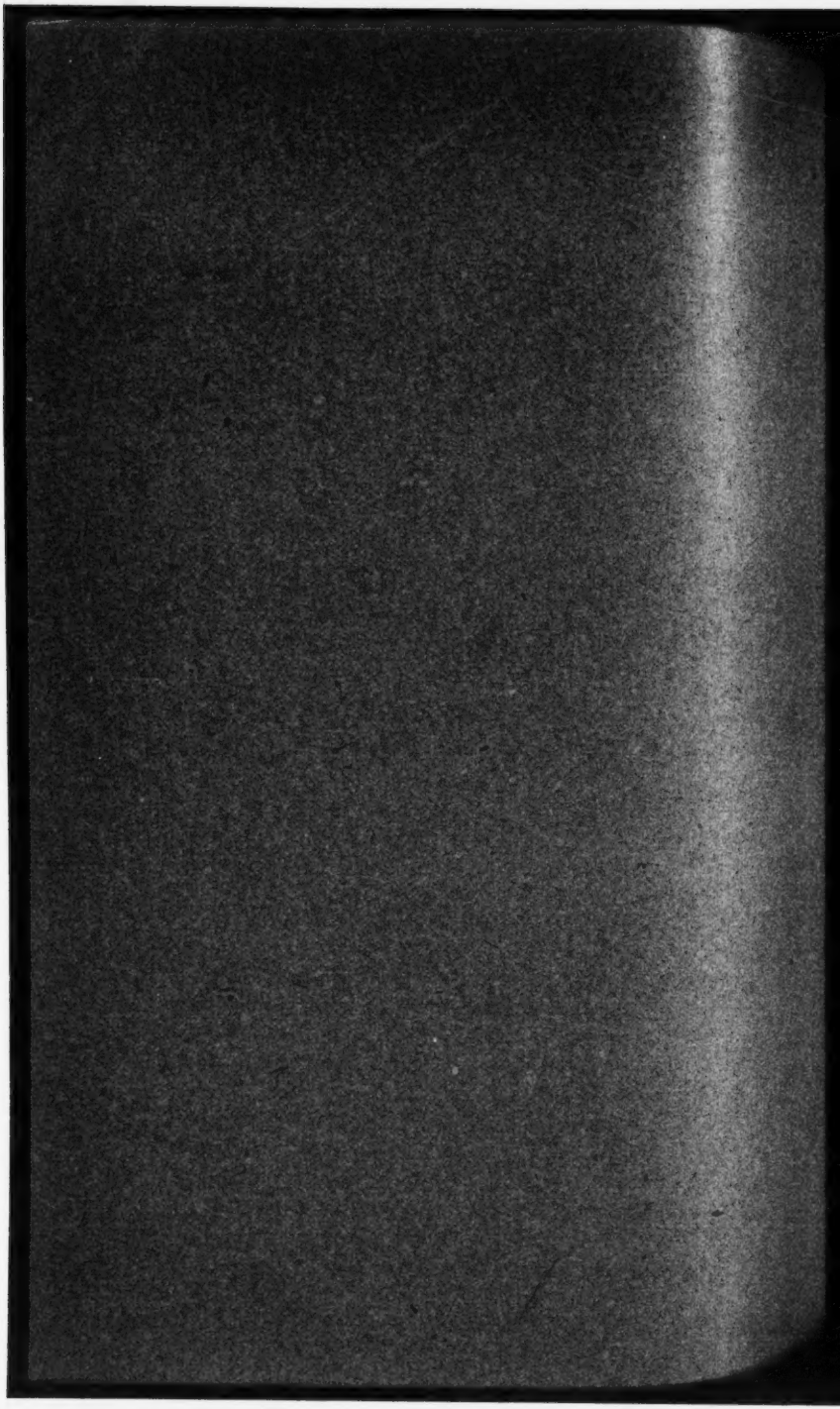

In the Supreme Court of the United States.

MAUDE E. KIMBALL,
Plaintiff in Error,

AGAINST

HARRIET A. KIMBALL, HARRIET I. JAMES and JOHN S. JAMES,
Defendants in Error.

No. 594.

BRIEF FOR DEFENDANTS IN ERROR ON MOTION TO DISMISS WRIT OF ERROR.

This case is brought into this Court by writ of error to review an order of the Court of Appeals of the State of New York allowed by Mr. Justice BREWER and dated the 16th day of February, 1898. (see Writ of Error in printed Transcript of Record, p. 76). The record of the State Court was filed in the office of the Clerk of this Court on the 21st day of February, 1898, a printed copy of which is herewith submitted, and the case is now on the calendar of this Court for the October Term, 1897, as Number 594. The defendants in error have appeared herein by counsel and now move to dismiss the writ of error or affirm the order of the Court of Appeals (see Notice of Motion annexed to this brief).

The motion is made on the verified petition of the defendants in error dated March 17, 1898, which is on file in the office of the Clerk of this Court, a printed copy of which is hereto annexed as well as on the Record from the State Court. Attached to the petition are two exhibits, one of which is an exemplified copy of the proceedings in the Surrogate's Court of the County of Kings, State of New York, on the probate of the last will and Testament of Edward C. Kimball, deceased, marked "Exhibit 1"

(see pp. 19–29 of this brief), and the other is a copy of a letter written by Arnold & Greene, attorneys for the defendants in error, to W. Harlock, Esq., attorney for the plaintiff in error, dated March 25th, 1897, marked "Exhibit 2" (see p. 30 of this brief).

The following is a brief statement of the facts and object of the motion:

Edward C. Kimball died in the City of Brooklyn on the 9th day of November, 1896, leaving him surviving as his only next of kin and heirs at law the defendants in error Harriet A. Kimball, his mother, and Harriet I. James, his sister. He left certain personal property in said city, and was also seized of a one-half interest in certain real estate situated therein subject to the life estate of his said mother. He was a member of the Consolidated Exchange of the City of New York, and on his death, if he left no widow him surviving, a certain sum was payable out of the gratuity fund of said Exchange to his said mother and sister as his next of kin.

On the 10th day of November, 1896, the defendant in error Harriet A. Kimball applied to the Surrogate's Court of the County of Kings for letters of administration of the goods, &c., of Edward C. Kimball, deceased, and she asked in her petition to have the defendant in error John S. James joined with her in the administration of the estate. No will of the deceased had been discovered, although diligent search had been made for one. Mrs. Kimball was advised by her counsel that her son had died unmarried; that although he had entered into a ceremony of marriage with the plaintiff in error such ceremony of marriage was invalid for the reason that the plaintiff in error could not legally make a contract of marriage, because she was a married woman; that while it was true that she had obtained a judgment of divorce from her husband James L. Semon in the District Court of North Dakota, such judgment was null and void for the reason that the Court granting the same did not have jurisdiction to make such judgment; that this appeared on the face of the decree (see Record, pp. 14–16); that such decree was granted by default; that the summons in the action was served on Semon outside of the State of North Dakota and in the State of New York and that Semon did not appear in said action in person or by attorney. On the advice of counsel, Mrs. Kimball stated in her petition for letters of administration that her son died intestate and unmarried and on the 10th day of November, 1896, letters of administration were issued to Mrs. Kimball and Mr. James (see Record, pp. 11, 12).

Thereafter and on or about the 17th day of December, 1896, proceedings were commenced in said Surrogate's Court by the plaintiff in error to have such letters of administration revoked and to have new letters of administration granted to her *as the widow of the deceased* on the ground that the petition on which the original letters of administration were granted contained a false suggestion of a material fact, in that it was alleged that Kimball died unmarried. The relief which the plaintiff in error asked for was as follows:

"*Wherefore your petitioner prays for a decree revoking such letters of administration heretofore issued to Harriet A. Kimball and John S. James and awarding to your petitioner letters of administration of the goods, chattels and credits which were of said deceased, and that said Harriet A. Kimball and John S. James and Harriet I. James, the sister of said deceased, may be cited to show cause why such a decree should not be made and why your petitioner should not have such further and other relief as may be meet, and that in the meantime and until the further orders of this Court said Harriet A. Kimball and John S. James and each of them be restrained and enjoined from further acting as administratrix and administrator respectively in the premises.*"

The defendants in error opposed the application, and the Surrogate's Court made an order on the 8th day of March, 1897, denying the application of the plaintiff in error to revoke letters of administration granted to Mrs. Kimball and Mr. James, and decided incidentally that the plaintiff in error was not the widow of the deceased. All papers in the proceeding in the Surrogate's Court on the application above referred to appear in the printed record, pages 1 to 64. A copy of the order of March 8, 1897, is found in the record, pages 57, 58.

On the 23d day of March, 1897, the last will and testament of Edward C. Kimball was found in an out-of-the-way place in an office which he had occupied in his lifetime (see Petition, p. 15 of this brief). On the 25th day of March, 1897, a petition for the probate of said last will and testament was presented to the Surrogate's Court of the County of Kings by the defendants in error Harriet A. Kimball and Harriet I. James, and on the same day said will was duly admitted to probate and letters testamentary granted thereon to Mrs. Kimball and Mrs. James, the executrices appointed in said will, pursuant to an order of said Surrogate's Court bearing date the 25th day of March, 1897. In this order it was, among other things, adjudged *that the letters of administration issued to Mrs. Kimball and Mr. James on the 10th*

day of November, 1896, be revoked (see p. 27 of this brief). An exemplified copy of said will and testament and of all proceedings on the probate thereof and of said letters testamentary and of said order of March 25th, 1897, will be found on pages 19 to 29 of this brief.

On the same day to wit, on the 25th day of March, 1897 Messrs. Arnold & Greene, the attorneys for the defendants in error, sent a letter to W. Harlock, Esq., attorney for the plaintiff in error in which it was stated that said will had been proved and the letters of administration revoked and a copy of said order of March 25th, 1897, was enclosed (see copy letter, p. 30 of this brief). Instead of moving in the Surrogate's Court to be relieved from the effect of the order of the Surrogate's Court of March 8th, 1897, on the ground of newly discovered evidence growing out of the discovery and probate of Kimball's will, the plaintiff in error took an appeal from said order of March 8th, 1897, to the Appellate Division of the Supreme Court of the State of New York, Second Department, which Court, after hearing the said appeal, duly made an order on the 22d day of June, 1897, affirming the order of the Surrogate's Court so appealed from. The plaintiff then took an appeal from the said order of the Appellate Division of the Supreme Court to the Court of Appeals of the State of New York, which Court after hearing said appeal duly made an order on the 4th day of February, 1898, affirming the order of the Appellate Division so appealed from, and it was from this order of the Court of Appeals of February 4th, 1898, that the writ of error was allowed (see copy papers on appeal in the printed record, pp. 64 to 88).

It further appears from said petition that the marriage ceremony between Kimball and the plaintiff in error was entered into on the 29th day of June, 1895; that the will and testament of said Kimball was executed on the 7th day of June, 1890, and that he disposed of the whole of his estate by said will and testament. There was no issue born to said Kimball and plaintiff in error in the lifetime of said Kimball or afterwards (see p. 16 of this brief).

On the foregoing facts it is respectfully insisted by the defendants in error.

1st. That there is no Federal question necessarily involved in the determination of this case.

2d. That the writ of error does not bring up for rehearing or adjudication any practical question whatever.

3d. That the writ of error does not bring up for rehearing or adjudication the question whether the letters of administration issued to Mrs. Kimball and Mr. James were duly issued for the reason that said letters of administration have already been duly revoked by said Surrogate's Court.

4th. That the writ of error does not bring up for rehearing or adjudication the question whether the plaintiff in error is entitled to letters of administration because it has been duly decided by the Surrogate's Court that Kimball did not die intestate, but left a last will and testament which has been duly admitted to probate and letters testamentary issued thereon, by which decision the plaintiff in error is bound.

POINTS.

I.

The Surrogate's Court of the County of Kings had jurisdiction to grant letters of administration of the goods, &c., of Edward C. Kimball, deceased, to his mother Harriet A. Kimball and to John S. James.

It conclusively appears that Edward C. Kimball was at the time of his death a resident of the County of Kings and died possessed of certain personal property situated in said county. It was then believed that he had died intestate and it was so alleged in the petition on which such letters were granted (see Record, pp. 9, 10).

Section 2476 of the New York Code of Civil Procedure reads as follows:

"*The Surrogate's Court of each County has jurisdiction exclusive of every other Surrogate's Court to take proof of a Will and to grant Letters Testamentary thereupon or to grant Letters of Administration as the case requires in either of the following cases:*

"*1. Where the decedent was at the time of his death a resident of that County whether his death happened there or elsewhere.*"

See Comstock vs. Crawford, 3 Wall., 396-403.

The defendant in error Harriet A. Kimball, the mother of the deceased, was entitled to letters of administration.

Section 2260 of the New York Code of Civil Procedure reads as follows:

"*Administration in case of intestacy must be granted to the relatives of the deceased entitled to succeed to his personal property who will accept the same in the following order: (1) to the surviving husband or widow; (2) to the children; (3) to the father; (4) to the mother.*" * * *

The defendant in error John S. James was properly joined with Mrs. Kimball in the administration in pursuance of her request contained in her petition (see copy of petition in Record, pp. 9, 10):

"*If there are several persons equally entitled to administration the Surrogate may grant Letters to one or more of such persons, and administration may be granted to one or more competent persons, although not entitled to the same, with the consent of the person entitled to be joined with such person or persons.*" * * *

N. Y. Code, Sec. 2660.

The petition on which letters of administration were granted contains all the necessary allegations to give the Surrogate's Court jurisdiction to grant the letters.

Redfield's Law & Practice of Surrogate's Courts, pp. 287-296.

II.

The Surrogate's Court had jurisdiction to make the order of March 25th, 1897, admitting Kimball's will to probate, granting letters testamentary *and revoking letters of administration granted to Mrs. Kimball and Mr. James.*

When the will of Kimball was found the Surrogate's Court had jurisdiction to grant probate thereof, and to issue letters testatamentary thereon (see N. Y. Code of Civil Procedure, Sec. 2416, as above quoted).

And it was also the duty of the Surrogate, in the decree admitting the will to probate, to revoke the letters of administration theretofore issued by him to Mrs. Kimball and Mr. James.

N. Y. Code of Code of Civil Procedure, Sec. 2684, reads as follows:

*"Where letters of administration on the ground of intestacy have been granted, a will is admitted to probate and letters are issued thereupon; * * * the decree granting or revoking probate must revoke the former letters."*

The petition on which probate was granted contained all the necessary allegations to give the Surrogate's Court jurisdiction to admit the will to probate and make the order of March 25th, 1897.

Redf. Law and Practice of Surrogate's Court, p. 130.

III.

It cannot be claimed by the plaintiff in error that her marriage to Kimball revoked his will and that therefore she was not bound by the proceedings on the probate thereof, or by the order by the Court therein. His will was made over five years before his alleged marriage to her and disposed of all of his property to his mother and sister. He died without issue born in his lifetime or afterwards.

By 2 Rev. Statutes, State of N. Y., Chap. 6, Title 1, Secs. 42, 43, it is provided as follows:

Sec. 42. "No will in writing, except in the cases hereinafter mentioned, nor any part thereof, shall be revoked, or altered, otherwise than by some other will in writing, or some other writing of the testator, declaring such revocation or alteration, and executed with the same formalities with which the will itself was required by law to be executed; or unless such will be burnt, torn, cancelled, obliterated or destroyed, with the intent and for the purpose of revoking the same, by the testator himself, or by another person in his presence, by his direction and consent; and, when so done by another person, the direction and consent of the testator, and the fact of such injury or destruction, shall be proved by at least two witnesses."

Sec. 43. "If, after the making of any will, disposing of the whole estate of the testator, such testator shall marry, and have issue of such marriage, born either in his lifetime or after his death, and the wife or the issue of such marriage shall be living at the death of the testator such will shall be deemed revoked, unless provision shall have been made for such issue by some settlement, or unless such issue shall be provided for in the will, or in such way mentioned

therein as to show an intention not to make such provision; and no other evidence to rebut the presumption of such revocation shall be received."

IV.

When the Surrogate's Court made the order of March 25th, 1897, which among other things revoked the letters of administration granted to Mrs. Kimball and Mr. James, it granted the relief which the plaintiff in error asked for in her petition and left no practical question for this Court to decide. The relief which the plaintiff in error asked for was twofold: (1) *The revocation of letters of administratian granted to Mrs. Kimball and Mr. James; (2) that new letters of administration be granted to herself.* But the letters of administration granted to Mrs. Kimball and Mr. James have already been revoked, and letters of administration cannot, of course, be issued to her now, because a will has been found and proved and letters testamentary issued thereon.

N. Y. Code, Sec. 2476, as above quoted.

It is true that the order of the Surrogate's Court of March 8th, 1897, decided incidentally that the plaintiff in error was not Kimball's widow, but that question became an abstract question when the letters of administration which the plaintiff in error sought to have revoked were revoked by the Surrogate. If she desires to be relieved from the effect of that decision she can obtain any relief to which she is entitled from the Surrogate's Court. That Court has the power to grant such relief under Section 2481 of the Code of Civil Procedure, which reads as follows:

Sec. 2481. A Surrogate, in Court or out of Court, as the case requires, has power:

6. To open, vacate, modify or set aside or to enter, as of a former time, a decree or order of his Court; or to grant a new trial or a new hearing for fraud, newly discovered evidence, clerical error or other sufficient cause. The powers conferred by this subdivision must be exercised only in a like case and in the same manner as a court of record and of general jurisdiction exercises the same powers. Upon an appeal from a determination of the Surrogate, made upon an application pursuant to this subdivision, the General Term of the Su-

preme Court has the same power as the Surrogate; and his determination must be reviewed as if an original application was made to that term.

V.

The plaintiff in error cannot impeach the order of the Surrogate's Court of March 25th, 1897, on this motion. That order was made by that Court in the exercise of its judicial authority, and can only be questioned on appeal in the mode provided by the laws of the State of New York for review of determinations of Surrogate's Courts, and its actions respecting them, however irregular, cannot be impeached collaterally.

"*By a statute of Wisconsin, under which the administrator was appointed, the only facts necessary to give the probate court jurisdiction were the death of the non-resident intestate and the possession by him, at the time, of personal property within the territory. Both of these facts are recited in the record of the proceedings produced by the defendant, which sets forth the letters of administration at large. These recitals are prima facie evidence of the facts recited (12 Wendall, 102; 28 N. Y., 641). They show the jurisdiction of the Court over the subject. What followed was done in the exercise of its judicial authority, and can only be questioned on appeal. Whether there was a widow of the deceased, or any next of kin, or creditor, who was a proper person to receive letters, if he had applied for them, or to which of these several parties it was meet that the administration should be trusted, were matters for the consideration and determination of the Court, and its action respecting them, however irregular, cannot be impeached collaterally.*" Comstock vs. Crawford, 3 Wall., 396–407.

See Fouvergne vs. City of New Orleans, 18 How., 470–473. Kelly vs. West, 80 N. Y., 139.

It follows, therefore, that, although the plaintiff in error was not cited to attend the probate proceeding, because she was not recognized as Kimball's widow, she cannot attack the order of March 25, 1897, on this motion, and is bound by it as if she had been made a party until it is reversed or set aside.

The plaintiff in error evidently desires to have this Honorable

Court pass in this case upon the question of her *status*. That question involves the validity of the judgment of the Court of North Dakota, *dated January 26, 1891*, in the action brought by her against James L. Semon, her husband, for a divorce, in which action the summons was served upon Semon outside of the State of North Dakota, in which he did not appear in person or by attorney, and in which judgment was taken by default. These facts are recited in the original decree (Printed Record, pp. 14-16), and if it should be held that the original judgment of the District Court of North Dakota was void for want of jurisdiction, other questions will have to be considered, viz., as to the effect of an order made by said Court in proceedings taken by Semon after Kimball's death, and after letters of administration were granted to Mrs. Kimball and Mr. James, to have the original decree of divorce amended *nunc pro tunc*, so as to recite that Semon had appeared and answered in the action and submitted himself to the jurisdiction of the Court, and whether the courts of New York have denied due faith and credit to the judgment of the Court of North Dakota. These are very important questions, which should be decided, not as academic questions, but in an actual litigation. As already stated, there is nothing left to this litigation. If this Honorable Court should entertain the writ of error and deny this motion, and, ultimately, after argument, decide the case in favor of the plaintiff in error on its merits, what practical result will follow from its determination? The Surrogate's Court has already granted the only relief which the plaintiff in error asks in this case, or which can be granted by this Court if it should decide in favor of the plaintiff in error on the merits. This Honorable Court may well turn her over to the Surrogate's Court in the confident expectation that full justice will be done to her in that court.

VI.

The order of the Surrogate's Court of March 8th, 1897, can be sustained on grounds not necessarily involving any Federal question, and for that reason the writ of error should be dismissed.

When letters of administration were granted by the Surrogate to Mrs. Kimball and Mr. James on the 10th of November, 1896, the

original decree of divorce which the Court of North Dakota had granted to the plaintiff in error had not been amended. The original decree recited that the summons had been served outside of the State of North Dakota on the defendant, and that the defendant had not appeared in the action in person or by attorney, and that judgment was taken by default. This judgment was, under the decisions of the Courts of the State of New York, null and void for want of jurisdiction (see Opinion of Court of Appeals in this case in printed Record, pp. 82-89).

It follows, therefore, that the Surrogate could not recognize the plaintiff in error as Kimball's widow under the New York cases. His duty was to follow those cases, even if this Court should be of the opinion that they were decided incorrectly. In other words, the question was, what was the law of the State of New York as to the *status* of the plaintiff in error when letters of administration were issued, not whether that law was right or not. This was a question of local or State law, not a Federal question, arising incidentally in connection with the grant of administration on the estate of a deceased person.

The letters of administration having duly issued, the only ground on which the plaintiff in error could ask to have them revoked was that they contained a false suggestion of a material fact.

See N. Y. Code, Sec. 2585, subdivision 4, which reads as follows:

"*In either of the following cases, a creditor or person interested in the estate of a decedent may present to to the Surrogate's Court, from which letters were issued to an executor or administrator, a written petition, duly verified, praying for a decree revoking those letters; and that the executor or administrator may be cited to show cause why a decree should not be made accordingly:*

"*4. Where the grant of his letters was obtained by a false suggestion of a material fact.*"

And the only allegation in the petition of plaintiff in error in that respect is, that the allegation that Kimball died unmarried was such a false suggestion of a material fact. That statement was

true for the reasons above given, and the order of March 8, 1897, was therefore correct and no federal question arises on an appeal therefrom.

VII.

The only issue in this case relates to the power of the Surrogate's Court to grant and revoke administration on the estate of a deceased person who had died within its jurisdiction.

This Honorable Court has held that jurisdiction over testamentary matters belonged exclusively to the State Courts.

Yenley vs. Lavender, 21 Wall., 276–284.
Fouvergne vs. City of New Orleans, 18 How., 470.
See, also, Langdon vs. Goddard, 2 Story, 267.

As already stated, the *status* of the plaintiff arose incidentally in the case, but the plaintiff in error had an ample remedy in that respect under the provisions of the New York Code of Civil Procedure above quoted. It appears, therefore, that this Court will not review the order of the Court of Appeals for the reason that the State Courts have exclusive jurisdiction of the subject.

VIII.

The writ of error allowed herein should be dismissed.

LEMUEL H. ARNOLD,
Counsel for Defendants in Error,
3 Broad Street,
New York City.

IN THE SUPREME COURT OF THE UNITED STATES.

MAUDE E. KIMBALL, Plaintiff in Error, AGAINST HARRIET A. KIMBALL, HARRIET I. JAMES and JOHN S. JAMES, Defendants in Error.	No. 594.

SIR—Take notice that on the printed brief herewith served upon you, to which is annexed a printed copy of the petition of the defendants in error with its exhibits, the original petition having been filed in the Office of the Clerk of the Supreme Court, and on the transcript of record, a printed copy of which having been served upon you, the defendants in error will move this Honorable Court at a stated term thereof to be held at the Capitol in the City of Washington, D. C., on the 11th day of April, 1898, at the opening of the Court on that day, that the writ of error allowed herein be dismissed with costs on the grounds that no Federal question is involved in this case and that there are no practical questions in this case for rehearing or adjudication by this Honorable Court, or that this Honorable Court affirm the order of the Court of Appeals of the State of New York, to which Court said writ of error was allowed with costs, and for such further or other relief as may be just.

Dated New York City, March 19, 1898.

L. H. ARNOLD,
Attorney for Harriet A. Kimball, Harriet I. James and John S. James, Defendants in Error,
3 Broad Street,
New York City,
Borough of Manhattan,
New York.

To W. HARLOCK, ESQ.,
Attorney for Plaintiff in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

MAUDE E. KIMBALL,
Plaintiff in Error,

AGAINST

HARRIET A. KIMBALL, HARRIET I. JAMES and JOHN S. JAMES,
Defendants in Error.

No. 594.

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of Harriet A. Kimball, Harriet I. James and John S. James, the defendants in error herein, all of the City of New York, Borough of Brooklyn, in the County of Kings, State of New York, respectfully shows to this Honorable Court as follows, namely:

Edward C. Kimball died in the City of Brooklyn on the 9th day of November, 1896, leaving him surviving as his only next of kin and heirs at law your petitioner Harriet A. Kimball, his mother, and your petitioner Harriet I. James, his sister. He left certain personal property in said city and was also seized of a one-half interest in certain real estate situated therein, subject to the life estate of his said mother. He was a member of the Consolidated Exchange of the City of New York, and on his death, if he left no widow him surviving, a certain sum was payable out of the gratuity fund of said Exchange to his said mother and sister as his nearest of kin. On the 10th of November, 1896, your petitioner said Harriet A. Kimball applied to the Surrogate's Court of the County of Kings, State of New York, for letters of administration of the goods, &c., of Edward C. Kimball, deceased, and she asked in her petition to have your petitioner John S. James joined with her in the administration of the estate. No will of the deceased had been discovered, although diligent search had been made for one. Your petitioners were informed and advised by their counsel that the said Kimball died unmarried; that, although he had entered

into a ceremony of marriage with the plaintiff in error, such ceremony of marriage was invalid for the reason that the plaintiff in error could not legally make such a contract of marriage because she was a married woman; that while it was true that she had obtained a judgment of divorce from her husband, James L. Semon, in the District Court of North Dakota, such judgment was null and void for the reason that the Court granting the same did not have jurisdiction to make such a judgment; that this appeared on the face of the decree granting such divorce; that such decree was granted by default and that the summons in the action was served upon Semon outside of the State of North Dakota and in the State of New York, and that Semon did not appear in the action in person or by attorney. Accordingly, on the advice of counsel, it was stated in said petition for letters of administration that said Kimball died intestate and unmarried, and on the 10th day of November, 1896, letters of administration were issued to Mrs. Kimball and Mr. James.

Thereafter and on or about the 17th day of December, 1896, proceedings were commenced in said Surrogate's Court by the plaintiff in error to have such letters of administration revoked and to have new letters of administration granted to her as the widow of the deceased, on the ground that the petition on which the original letters of administration were granted contained a false suggestion of a material fact in that it alleged that Kimball had died unmarried. Your petitioners appeared in that proceeding by counsel, and after a hearing before the Surrogate he denied the application of the plaintiff in error by an order bearing date the 8th day of March, 1897.

On the 23d day of March, 1897, the last will and testament of Edward C. Kimball, deceased, was found in an out-of-the-way place in an office which he had occupied in his lifetime. On the 25th day of March, 1897, a petition for the probate of said last will and testament was duly presented to the Surrogate's Court for the County of Kings by your petitioners Harriet A. Kimball and Harriet I. James, and on the same day said will was duly admitted to probate and letters testamentary granted thereon to Mrs. Kimball and Mrs. James, the executrices appointed in said will pursuant to an order of said Surrogate's Court bearing date the 25th day of March, 1897. In this order it was, among other things, adjudged that the letters of administration issued to Mrs. Kimball and Mr. James on the 10th day of November, 1896, be revoked and the same were revoked accordingly. An exemplified copy of said will and testament and of all

proceedings on the probate thereof in the Surrogate's Court and of said letters testamentary and of said order of March 25th, 1897, is hereto annexed marked "Exhibit 1."

On the same day, to wit, on the 25th day of March, 1897, Messrs. Arnold & Greene, the attorneys for your petitioners, sent a letter to W. Harlock, Esq., attorney for the plaintiff in error, in which it was stated that said will had been proved and the letters of administration revoked and a copy of said order of March 25th, 1897, was enclosed. A copy of said letter is hereto annexed marked "Exhibit 2." No proceedings have ever been taken by the plaintiff in error in the Surrogate's Court of the County of Kings for any relief from the effect of said order of said Surrogate's Court of March 8th, 1897, in consequence of the discovery and probate of the last will and testament of said Kimball, nor has she attacked the probate of said will, but instead thereof she has persisted in prosecuting certain appeals taken by her from the order of March 8th, 1897, and from the orders made by the Appellate Courts as follows, viz.: She first took an appeal from said order of March 8, 1897, to the Appellate Division of the Supreme Court of the State of New York, Second Department, which Court after hearing said appeal, duly made an order on the 22d day of June, 1897, affirming the order of the Surrogate's Court so appealed from. She next took an appeal from said order of the Appellate Division of the Supreme Court to the Court of Appeals of said State of New York, which, after hearing said appeal, duly made an order on the 4th day of February, 1898, affirming the order of the Appellate Division of the Supreme Court so appealed from. She then obtained from Mr. Justice BREWER, of this Court, a writ of error, and on the 21st day of February, 1898, filed in the office of the Clerk of this Court the record from the State Court; a copy of all the papers in this case in all the State Courts is contained in said record, a printed copy of which is herewith submitted.

And your petitioners further say as follows: The marriage ceremony between Kimball and the plaintiff in error was entered into on the 29th day of June, 1895. The will and testament of Kimball which was admitted to probate was executed on the 7th day of June, 1890, and he disposed of the whole of his estate by said will and testament. There was no issue born to said Kimball and the plaintiff in error in the lifetime of said Kimball or afterwards. Your petitioners are advised by their said counsel that by the laws of the State of New York the said will and testament was not revoked by any subsequent marriage for the reason that the testator disposed of the whole of his estate by his last

will and testament and no issue was born of said marriage either in his lifetime or after his death and the plaintiff in error is not therefore entitled to any portion of his estate which passed under his will even if she were his lawful widow.

And your petitioners deny that the petition made by Mrs. Kimball for letters of administration of the goods, &c., of Edward C. Kimball, deceased, contained a false suggestion of any material fact, and they allege that the allegation that said Kimball died unmarried was absolutely correct when said petition was made and when said letters of administration were granted, for the reason that the decree of divorce which plaintiff in error had obtained as above stated showed on its face on the 10th day of November, 1896, the date of said letters of administration, that the Court of North Dakota did not have jurisdiction to grant the same, and your petitioners were advised by their said counsel that the Surrogate's Court was bound by the laws of the State of New York not to recognize said decree of divorce as it then existed as dissolving the marriage relation between the plaintiff in error and James L. Semon, her husband. The order amending the decree of divorce, whatever effect it may have had on the original decree, was not made until December, 1896, and after said letters of administration had been granted.

Wherefore, your petitioners pray that the writ of error allowed herein be dismissed with costs, or that the order of the Court of Appeals be affirmed with costs, and that your petitioners have such further and other relief as to this Honorable Court may seem just.

Dated New York, March 17, 1898.

HARRIET A. KIMBALL,
HARRIET I. JAMES,
JOHN S. JAMES.

LEMUEL H. ARNOLD,
Of Counsel.

STATE OF NEW YORK, }
County of Kings, } ss.:

HARRIET A. KIMBALL, HARRIET I. JAMES and JOHN S. JAMES, being severally duly sworn, depose and say, each for herself and himself, as follows, namely:

I have heard read the foregoing petition subscribed by me and know the contents thereof, and the same is true of my own knowl-

edge, except as to the matters therein stated to be alleged on information and belief, and as to those matters I believe it to be true.

HARRIET A. KIMBALL.
HARRIET I. JAMES.
JOHN S. JAMES.

Sworn to before me this 17th day of March, 1898.

FRANCIS H. LUDLOW,
Notary Public,
Kings County, N. Y.

STATE OF NEW YORK, County of Kings, } ss.:

I, WILLIAM P. WUEST, Clerk of the County of Kings, and Clerk of the Supreme Court of the State of New York in and for said County (said Court being a Court of Record), do hereby [L. S.] certify that Mr. Francis H. Ludlow, before whom the annexed deposition was taken, was, at the time of taking the same, a Notary Public in and for said County, dwelling in said County, commissioned and sworn and duly authorized to administer oaths for general purposes, and, further, that I am well acquainted with the handwriting of such Notary, and verily believe the signature to said deposition is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of said County and Court this 18th day of March, 1898.

WILLIAM P. WUEST,
Clerk.

Exhibit I.

THE PEOPLE OF THE STATE OF NEW YORK,

By the Grace of God Free and Independent.

To all to whom these presents shall come or may concern, GREETING:

Know Ye, That we having examined the records and files in the office of the Surrogate of the County of Kings, do find there remaining a certain record of the Will, all papers on probate and Letters Testamentary, In the Matter of the probate of the last Will and Testament of Edward C. Kimball, deceased, in the words and figures following, to wit:

The Last Will and Testament of Edward C. Kimball of the City of Brooklyn, Kings County, New York.

I, Edward C. Kimball of the City of Brooklyn, Kings County, New York, do hereby make, publish and declare this to be my last Will and Testament, that is to say:

First: I hereby give, devise and bequeath to my mother, Harriet A. Kimball, her heirs and assigns forever all the estate, both real and personal, of every name, nature and description and wheresoever situated, of which I may die seized or possessed.

Should however my said mother die before my own decease then and in that event I give, devise and bequeath all my estate, both real and personal of every name, nature and description and wheresoever situated, to my sister, Harriet I. James, wife of John S. James her heirs and assigns forever.

Second: I hereby nominate, constitute and appoint my said mother, Harriet A. Kimball and my said sister Harriet I. James, Executrices and Trustees of and under this my Will and Testament.

Third: I hereby revoke all other Wills by me at any time made.

In Witness Whereof I, Edward C. Kimball, the testator, have to this my last Will and Testament set my hand and seal the Seventh day of July in the year of our Lord One thousand eight hundred and ninety.

Edward C. Kimball (L. S.)

Signed, sealed, published and declared by Edward C. Kimball the testator as and for his last Will and Testament in the presence of us, who were present at the same time, and who at his request and in his presence and in the presence of each other have hereunto subscribed our names as witnesses.

CARLL H. DESILVER 43 Pierrepont St., Brooklyn, N. Y.
WM. H. SUSSDORFF Woodside, N. Y.
HUMPHREY Y. CUMMINS, 166 6th Ave., Brooklyn, N. Y.

KINGS COUNTY SURROGATE'S COURT.

IN THE MATTER
OF
The Probate of the last Will and Testament of EDWARD C. KIMBALL, deceased.

TO THE SURROGATE'S COURT OF THE COUNTY OF KINGS :

The petition of Harriet A. Kimball and Harriet I. James, of the City of Brooklyn, respectfully shows to this Court :

That they are the executrices named in the last will and testament of Edward C. Kimball, late of the City of Brooklyn, in the County of Kings, deceased.

That the said deceased was at the time of his death a resident of the County of Kings, and departed this life in said county on the 9th day of November, in the year 1896.

That said last will and testament was made at the City of and relates to both real and personal property, and bears date the 7th day of July, 1890, and was signed by Carll H. De Silver, William H. Sussdorff and Humphrey Y. Cummins as witnesses.

That said deceased left him surviving no widow and no issue or descendants.

That all the heirs and next of kin of said deceased are as follows, to wit :

The petitioner Harriet A. Kimball, the mother of deceased, who resides at the City of Brooklyn.

The petitioner Harriet I. James, the sister of deceased, who resides at the City of Brooklyn; and that both are of full age and sound mind.

And your petitioners further allege that said last will and testament of Edward C. Kimball, deceased, was not found by them, nor did they know of its existence until the 23d day of March, 1897; that it was then found in an old pocketbook in a drawer in a desk in the office in the City of New York, formerly occupied by the deceased. That heretofore and on the 10th day of November, 1896, your petitioner, the said Harriet A. Kimball, applied to the Surrogate of the County of Kings for letters of administration of the goods, &c., which were of said Edward C. Kimball, deceased, and to have John S. James joined with her in the administration of said estate, and that on the same day letters of administration were duly issued by said Surrogate to said Harriet A. Kimball and John S. James, appointing them administrators of the goods, &c., of said deceased, and that said administrators duly qualified and have ever since been engaged in the discharge of their duties as such administrators.

And your petitioners pray that the said instrument above described be proved and admitted to probate as a valid will of real and personal property, and that the above-named heirs and next of kin of said testator be cited to attend the probate thereof; and that letters testamentary be granted thereon according to law, and that the letters of administration of the goods, &c., of Edward C. Kimball, deceased, heretofore and on the 10th day of November, 1896, issued by the Surrogate to said Harriet A. Kimball and John S. James, be revoked.

Dated the 25th day of March, 1897.

HARRIET A. KIMBALL.
HARRIET I. JAMES.

STATE OF NEW YORK, }
County of Kings, } ss.:

HARRIET A. KIMBALL and HARRIET I. JAMES, the above-named petitioners, being duly sworn, doth depose and say, each for herself, that she has read the foregoing petition subscribed by her, and that the same is true of her own knowledge except as to the matters

therein stated to be alleged on information and belief, and as to those matters she believes it to be true.

HARRIET A. KIMBALL.
HARRIET I. JAMES.

Subscribed and sworn this 25th day of March, 1897.

FRANCIS H. LUDLOW,
Notary Public,
Kings Co.,
N. Y.

KINGS COUNTY SURROGATE'S COURT.

IN THE MATTER OF The Probote of the Last Will and Testament of EDWARD C. KIMBALL, deceased.	Waiver and Consent.

We, HARRIET A. KIMBALL and HARRIET I. JAMES, the undersigned, being of full age, and the only heirs and next of kin of Edward C. Kimball, deceased, named in the petition herein, do hereby appear in person and waive the issuance and service of a citation in the above-entitled matter, and consent that the last will and testament of Edward C. Kimball, deceased, bearing date the 7th of July, 1890, be admitted to probate forthwith.

HARRIET A. KIMBALL.
HARRIET I. JAMES.

STATE OF NEW YORK, County of Kings, } ss.:

On this day of March, in the year 1897, before me personally came Harriet A. Kimball and Harriet I. James, known to me to be the persons described in, and who executed, the foregoing waiver

and consent, and they severally acknowledged to me that they executed the same.

FRANCIS H. LUDLOW,
Notary Public,
Kings Co.,
N. Y.

SURROGATE'S COURT,

KINGS COUNTY.

IN THE MATTER OF The Probate of the Last Will and Testament of EDWARD C. KIMBALL, deceased.	Deposition of subscribing witness.

STATE OF NEW YORK, County of Kings, } ss.:

WILLIAM H. SUSSDORFF, of Woodside, New York, being duly sworn and examined before a Surrogate's Court of the County of Kings, deposes and says:

I was well acquainted with Edward C. Kimball now deceased.

That the subscription of the name of said decedent, at the end of the instrument now shown to me and offered for probate as the last will and testament of the said Edward C. Kimball, deceased, and bearing date the seventh day of July in the year one thousand eight hundred and ninety was made by the said decedent at the City of New York in the presence of myself and the other subscribing witnesses.

That at the time of making such subscription, the said decedent declared the said instrument so subscribed by him to be his last will and testament, and I thereupon signed my name as a witness, at the end of said instrument, at the request of said decedent, and in his presence. I also saw said Humphrey Y. Cummins and Carll H. De Silver, the other subscribing witnesses, sign their names as

witnesses at the end of said will, and know that they did so at the request and in the presence of said decedent.

That the said decedent, at the time of executing the said instrument, was over the age of twenty-one years, of sound mind and memory, and not under any restraint, and competent in every respect to make a will.

WM. H. SUSSDORFF.

Subscribed and sworn this 25th day of March, 1897.

GEO. B. ABBOTT,
Surrogate.

KINGS COUNTY SURROGATE'S COURT.

IN THE MATTER

OF

The Probate of the Last Will and Testament of EDWARD C. KIMBALL, deceased.

Deposition of Subscribing Witness.

STATE OF NEW YORK, County of Kings, } ss.:

CARLL H. DE SILVER, of the City of Brooklyn, Kings County, N. Y., being duly sworn and examined before a Surrogate's Court of the County of Kings, deposes and says:

I was well acquainted with Edward C. Kimball, now deceased.

That the subscription of the name of said decedent at the end of the instrument now shown to me and offered for probate as the last will and testament of the said Edward C. Kimball, deceased, and bearing date the seventh day of July, in the year one thousand eight hundred and ninety, was made by the said decedent at the City of New York in the presence of myself and the other subscribing witnesses.

That at the time of making such subscription the said decedent declared the said instrument so subscribed by him to be his last will and testament, and I thereupon signed my name as a witness at

the end of said instrument at the request of said decedent and in his presence. I also saw said Humphrey Y. Cummins and William H. Sussdorff, the other subscribing witnesses, sign their names as witnesses at the end of said will and know that they did so at the request and in the presence of said decedent.

That the said decedent, at the time of executing the said instrument, was over the age of twenty-one years, of sound mind and memory, and not under any restraint, and competent in every respect to make a will.

CARLL H. DE SILVER.

Subscribed and sworn this 25th day of March, 1897.

GEO. B. ABBOTT,
Surrogate.

KINGS COUNTY SURROGATE'S COURT.

IN THE MATTER
OF
The Probate of the Last Will and Testament of EDWARD C. KIMBALL, deceased.

Deposition of Subscribing Witness.

STATE OF NEW YORK, County of Kings, } ss.:

HUMPHREY Y. CUMMINS, of the City of Brooklyn, County of Kings, N. Y., being duly sworn and examined before a Surrogate's Court of the County of Kings, deposes and says:

I was well acquainted with Edward C. Kimball, now deceased.

That the subscription of the name of said decedent, at the end of the instrument now shown to me and offered for probate as the last will and testament of the said Edward C. Kimball, deceased, and bearing date the seventh day of July, in the year one thousand eight hundred and ninety, was made by the said decedent at the City of New York, in the presence of myself and the other subscribing witnesses.

That at the time of making such subscription the said decedent declared the said instrument so subscribed by him to be his last will and testament, and I thereupon signed my name as a witness at the end of said instrument at the request of said decedent and in his presence. I also saw said Carll H. DeSilver and Wm. H. Sussdorff, the other subscribing witnesses, sign their names as witnesses at the end of said will, and know that they did so at the request and in the presence of said decedent.

That the said decedent, at the time of executing the said instrument, was over the age of twenty-one years, of sound mind and memory, and not under any restraint, and competent in every respect to make a will.

HUMPHREY Y. CUMMINS.

Subscribed and sworn this 25th day of March, 1897.

GEO. B. ABBOTT,
Surrogate.

At a Surrogate's Court, held in and for the County of Kings, at the Surrogate's Court Room, in the Hall of Records, in the City of Brooklyn, on the 25th day of March, in the year one thousand eight hundred and ninety-seven.

Present—HON. GEORGE B. ABBOTT, Surrogate.

IN THE MATTER OF The Probate of the Last Will and Testament of EDWARD C. KIMBALL, late of the City of Brooklyn, deceased.	Decree granting probate.

Satisfactory proof having been made of the due waiver of service of the citation herein upon, or of the due appearance herein by, all persons entitled to notice of this proceeding;

And the witnesses to said last will and testament of Edward C. Kimball, deceased, having been sworn and examined, their examination reduced to writing and filed, and, it appearing by such proofs, that the said will was duly executed, and that the testator, at the time of executing it, was in all respects competent to make a will, and not under restraint; and this Court, being satisfied of the genuineness of the will, and the validity of its execution, and the probate thereof not having been contested,

It is ordered, adjudged and decreed that the instrument offered for probate herein be, and the same hereby is, admitted for probate as the last will and testament of the said Edward C. Kimball, deceased, valid to pass real and personal property, and that the said will, with the proofs thereof and this decree be recorded, and that letters testamentary be issued to the executrices who may qualify thereunder, and that the letters of administration of the goods, &c., of Edward C. Kimball, deceased, heretofore and on the 10th day of November, 1896, issued by this Court to said Harriet A. Kimball and John S. James, be, and the same hereby are, revoked.

GEO. B. ABBOTT,
Surrogate.

KINGS COUNTY SURROGATE'S COURT.

IN THE MATTER OF The Probate of the Last Will and Testament of EDWARD C. KIMBALL, deceased.	Oath of Executor.

STATE OF NEW YORK, County of Kings, } ss.:

We, HARRIET A. KIMBALL and HARRIET I. JAMES, executrices named in the last will and testament of Edward C. Kimball, late of the City of Brooklyn in the County of Kings, deceased, being duly sworn, do depose and say and each for herself deposes and says:

That I reside at Number 6 Pierrepont street in the said City of Brooklyn, that I am over twenty-one years of age, and that I will

well, faithfully and honestly discharge the duties of executrix of said last will and testament.

HARRIET A. KIMBALL.
HARRIET I. JAMES.

Subscribed and sworn to this 25th day of March, 1897.

GEO. B. ABBOTT,
Surrogate.

THE PEOPLE OF THE STATE OF NEW YORK,

BY THE GRACE OF GOD FREE AND INDEPENDENT.

TO ALL TO WHOM THESE PRESENTS SHALL COME OR MAY CONCERN, SEND GREETING:

KNOW YE that, at the City of Brooklyn, in the County of Kings, at a Surrogate's Court held on the Twenty-fifth day of March, in the year of our Lord One Thousand Eight hundred and Ninety-seven, before Hon. GEORGE B. ABBOTT, Surrogate of our said County, the last Will and Testament of Edward C. Kimball, late of the City of Brooklyn, deceased, was proved, and is now approved and allowed, by us; and

WHEREAS, the said deceased, at the time of his death, was a resident of the County of Kings, by reason whereof the proving and registering of the said Will, and the granting of administration of all and singular the goods, chattels and credits of the said deceased, and also the judicial settlement of the account thereof, do belong unto the Surrogate's Court of said County, the administration of all and singular the goods, chattels and credits of the said deceased in any way concerning his Will, is granted unto Harriet A. Kimball and Harriet I. James, of Number 6 Pierrepont Street, Brooklyn, Executrices in the said Will named, they being first duly sworn faithfully and honestly to discharge the duties of the said Executrices.

In testimony whereof, we have caused the Seal of the Surrogate's Court of Kings County to be hereunto affixed. Witness, Hon. GEORGE B. ABBOTT, Surrogate of our said County, at the City of

Brooklyn, the 26th day of March, in the year of our Lord One Thousand Eight Hundred and Ninety-seven.

JOSEPH W. CARROLL,
[L. S.] Clerk of the Surrogate's Court.

All which we have caused by these presents to be exemplified, and the Seal of our said Surrogate's Court to be hereunto affixed.

Witness, Hon. GEORGE B. ABBOTT, Surrogate of the County of Kings, the 3rd day of March, 1898.

JOSEPH W. CARROLL,
[L. S.] Clerk of the Surrogate's Court.

I, GEORGE B. ABBOTT, Surrogate of said County, and sole presiding Magistrate of the Surrogate's Court, do hereby certify that Joseph W. Carroll, whose name is subscribed to the preceding exemplification, is the Clerk of the said Surrogate's Court of the County of Kings, and that full faith and credit are due to his official acts. I further certify that the seal affixed to the exemplification is the seal of our said Surrogate's Court, and that the attestation thereof is in due form, and according to the form of attestation used in this State.

Witness my hand and the Seal of said Surrogate's Court this third day of March, one thousand eight hundred and ninety-eight.

GEO. B. ABBOTT,
[L. S.] Surrogate.

STATE OF NEW YORK, }
County of Kings, } ss.:

I, JOSEPH W. CARROLL, Clerk of the Surrogate's Court of the County of Kings, do hereby certify that Hon. GEORGE B. ABBOTT, whose name is subscribed to the preceding Certificate, is the sole presiding Magistrate of the Surrogate's Court of the County of Kings, duly elected, sworn and qualified, and that the signature of said Magistrate to said Certificate is genuine.

In Testimony Whereof, I have hereto set my hand and affixed the Seal of the said Court, this 3rd day of March, 1898.

JOSEPH W. CARROLL,
[L. S.] Clerk of the Surrogate's Court.

Exhibit 2.

ARNOLD & GREENE,
Counselors at Law,
Drexel Building,
Cor. Wall & Broad Streets.

Lemuel Hastings Arnold.
J. Warren Greene.
Francis H. Ludlow.

Cable Address, "Geotica," New York.

NEW YORK, March 25th, 1897.

W. HARLOCK, ESQ.:

DEAR SIR—We beg to inform you that the last Will and Testament of Edward C. Kimball, deceased, was found on the 23rd inst., and that the same has been proved before the Surrogate of Kings County and a decree made by the Surrogate admitting the Will to probate and directing that Letters Testamentary issue to the Executrices named in said Will and revoking the Letters of Administration heretofore, and on the 10th day of November, 1896, issued to Harriet A. Kimball and John S. James, appointing them administrators of the goods, &c., of Edward C. Kimball, deceased, a copy of which Decree we enclose.

Yours truly,

ARNOLD & GREENE.

Enclosure.

No. 248.

Brief of Arnold for D. E.

IN THE

Supreme Court of the United States.

Filed Feb. 27, 1899.

MAUDE S. KIMBALL,
Plaintiff in Error,

vs.

HARRIET A. KIMBALL, JOHN S. JAMES and HARRIET P. JAMES,
Defendants in Error.

Argument for Defendants in Error.

LEMUEL H. ARNOLD,
For Defendants in Error.

O. G. Bunnell, Walker and Centre Streets, N. Y.

In the Supreme Court of the United States.

MAUD E. KIMBALL,
Plaintiff in Error,

AGAINST

HARRIET A. KIMBALL, JOHN S. JAMES and HARRIET I. JAMES,
Defendants in Error.

No. 248.
October Term, 1898.

ARGUMENT FOR DEFENDANTS IN ERROR.

Statement.

This case is brought here by writ of error to the Court of Appeals of the State of New York to review an order of that Court bearing date February 4, 1898, which is set forth in the printed transcript of record at page 73.

That order affirmed an order of the Appellate Division of the Supreme Court of that State, which will be found at page 67 of the printed record, and which in turn affirmed an order of the Surrogate's Court of the County of Kings of the same State, bearing date the 8th day of March, 1897, which appears at page 57 of the printed record. The order of the Surrogate's Court denied a motion made by the plaintiff in error for the revocation of letters of administration of the goods, &c., of Edward C. Kimball, deceased, granted by the Surrogate on the 10th day of November, 1896, to Harriet A. Kimball and John S. James,

two of the defendants in error, and denied her application that new letters of administration be issued to her as the widow of the deceased. No other question than the right of administration on Kimball's estate is raised by the moving papers.

Record, pp. 9, 10.

The defendants in error respectfully insist that the question as to the right of administration thus presented to and decided by the Surrogate's Court is not now a practical question, for the reason that the last will and testament of Kimball has been found since the letters of administration were granted and has been duly proved, and letters testamentary issued thereon, and that the letters of administration granted by the Surrogate to Mrs. Kimball and Mr. James were revoked by the Surrogate on his own motion in March, 1897, and are not now in force. A motion was made by the defendants in error to dismiss the writ of error herein, on that ground, and was submitted to this Court in March, 1898. This Court decided to postpone the hearing of the motion until the case came regularly on for argument on the calendar. The motion papers are now before the Court together with the briefs of counsel on the motion.

The facts bearing upon the merits of the case, as found by the Surrogate, on the evidence submitted to to him, are as follows:

Edward C. Kimball died in the City of Brooklyn on the 9th day of November, 1896, intestate leaving him surviving his mother Harriet A. Kimball and his sister Harriet I. James (two of the defendants in error) as his only next of kin, and on the 10th day of November, 1896, letters of administration on his estate were duly issued by the Surrogate of Kings County to Harriet A. Kimball and to John S. James (one of the defendants in error).

Surrogate's First Finding of Fact, Record, p. 55.

At that time no will of Kimball had been discovered. In point of fact he did leave a will which was found afterwards and duly proved before the Surrogate as above stated.

Kimball went through a marriage ceremony with the plaintiff in error in the City of Brooklyn on the 29th day of June, 1895.

Surrogate's 6th Finding of Fact, Record, p. 56.

They separated in January, 1896, and he was not living with her at the time of his death.

Record, pp. 3, 13.

Prior thereto, and on the 12th day of May, 1885, at the City of New York, the plaintiff in error had married one James L. Semon.

Surrogate's 2nd Finding of Fact, Record, p. 55.

The plaintiff in error left Semon and in June, 1890, went to the State of North Dakota, where in the month of September, 1890, she commenced an action in the District Court, 5th Judicial District, County of Barnes, for a divorce from her said husband.

Surrogate's 3rd Finding of Fact, Record, p. 55.

The said Semon was, and ever since his marriage to the plaintiff in error had been a resident of the State New York. *He was not served with the summons in the divorce suit in the State of North Dakota, nor did he appear in said suit in person or by attorney.* The summons was served upon him personally in the City of New York on the 15th day of October, 1890. Such proceedings were thereafter had in said suit that on the 26th day of January, 1891, the Court made a decree granting a divorce to the plaintiff in error from her said husband by default, and it appeared on the face of the decree that the summons was served upon Semon

in the City of New York, and that he did not appear in said suit nor serve any answer or demurrer to the complaint therein.

Surrogate's 4th Finding of Fact, Record, p. 55.

The plaintiff in error went to North Dakota on the 5th day of June, 1890, and stayed there until the 5th day of February, 1891, during which period the domicile of her husband was in the State of New York. *She went to North Dakota for the purpose of procuring a divorce from her husband on grounds not recognized by the laws of the State of New York as sufficient cause for granting a divorce.*

Surrogate's 5th Finding of Fact, Record, p. 56.

Kimball knew when he went through the marriage ceremony with the plaintiff in error that she was a divorced woman, but he had no knowledge as to the methods by which such divorce was obtained, nor did he know that it was invalid, nor did he know that Semon was then living but subsequently he ascertained that he was living.

Surrogate's 7th Finding of Fact, Record, p. 56.

After the death of Kimball and in December, 1896, Semon applied to the Court of North Dakota which granted the decree of divorce to have a letter which he sent to the plaintiff's attorneys after receiving the summons in the divorce action filed in said Court as his answer in the divorce suit *nunc pro tunc* as of the date of its receipt by the plaintiff's attorneys and to have said decree of divorce made on the 26th of January, 1891, as above stated, amended *nunc pro tunc* as of that date, by striking out the recital to the effect that the plaintiff failed to answer, demur or make any appearance in said divorce suit, and by inserting in place thereof the following words: "The defendant having

appeared herein and submitted himself to the jurisdiction of the Court." Notice of said application was given only to the attorneys who appeared for the plaintiff in the divorce suit in North Dakota, and an order was made by said Court on the 16th day of December, 1896, on the default of the plaintiff granting said application and purporting to amend said decree of divorce *nunc pro tunc* in accordance with said application, but said Court did not have the power or jurisdiction to make such an order.

Surrogate's 8th Finding of Fact, Record, p. 56.

On the foregoing facts the Surrogate made the following conclusions of law:

1st. The Court of North Dakota which granted the decree of divorce of the plaintiff in error from said James L. Semon did not acquire jurisdiction of said Semon in that action, and the decree of divorce made by said Court on the 26th day of January, 1891, was and is a nullity.

2d. The Court of North Dakota did not have jurisdiction to make the order of December 16, 1896, amending the said decree of divorce *nunc pro tunc*, and said order was and is a nullity.

3d. The said order of December 16th, 1896, was not and is not binding upon the defendants in error and did not in any way affect or impair their rights or interests as heirs and next of kin of Edward C. Kimball, deceased, in the real estate and personal property left by him.

4th. The plaintiff in error was when she entered into the marriage ceremony with said Kimball the wife of James L. Semon, and could not and did not contract a lawful marriage with said Kimball.

5th. The said plaintiff in error is not the widow of said Edward C. Kimball, deceased, and is not entitled as such widow to letters of administration on his estate.

6th. Harriet A. Kimball, mother of said Edward C. Kimball, deceased, and one of the next of kin of said deceased, was entitled to letters of administration on his estate, and to have John S. James joined with her in the administration of said estate.

Record, pages 56 & 57.

On this decision the Surrogate made his order of March 8th, 1897, denying the motion to revoke the letters of administration already issued by him, from which order the plaintiff in error appealed, as above stated. On the hearing before the Surrogate a copy of the judgment roll in the action brought by the plaintiff in error against her husband James L. Semon in the District Court of North Dakota for a divorce, together with a copy of the record of that Court on the application made to amend the original judgment, *were produced and admitted in evidence.*

Record, p. 45.

The plaintiff in error now alleges that the New York courts did not give full faith and credit to such judgments and proceedings of the District Court of North Dakota, and that for that reason a constitutional question is involved.

See Assignments of Error, Record, pp. 79, 80.

But the assignments of error do not conform to the rules and practice of this Court, and for that reason the plaintiff in error should not be heard.

As already stated, the question before the Surrogate, and decided by him, related to the right of the plaintiff in error to administer on Kimball's estate. There is no assignment of any error of law or fact committed by

the Surrogate in making the order appealed from. The first assignment of error is that the New York Court did not hold that the decree of divorce granted by the District Court of North Dakota to the plaintiff in error from Semon on the 26th of January, 1891, was a good and valid decree and was not void.

The second assignment of error is to the same effect, with the addition that it was binding upon the parties to this proceeding and that the Surrogate's Court erred in not so holding, and in not making a decree herein accordingly.

The third assignment of error is that the New York Courts erred in not holding that the decree of divorce, as amended *nunc pro tunc* in December, 1896, was not void, and in not making a decree herein accordingly.

The fourth assignment of error is that the New York courts erred in not holding that the recital and finding in said decree of divorce that the defendant appeared and answered in said action, and submitted himself to the jurisdiction of the Court, was an adjudication duly made by said Court, and that full faith and credit were not given to such adjudication.

The fifth assignment of error is that the New York courts erred in not holding that by the force and effect of said decree the plaintiff in error was not the wife of Semon when she married Kimball, and by such marriage she became the lawful wife of Kimball, and upon his decease she became his widow.

The sixth assignment of error is that the New York courts did not give full faith and credit to said decree of divorce, nor to the order amending the same, nor to the record and judicial proceedings in the divorce case.

There is nowhere found in the assignments of error any allegation showing why the decree of the Surrogate is erroneous. The power of the Surrogate to revoke the letters of administration is given by Section 2585 of the Code of Civil Procedure of New York, which reads as follows :

" In either of the following cases a creditor or person interested in the estate of a decedent may present to the Surrogate's Court from which letters were issued to an executor or administrator, a written petition, duly verified, praying for a decree revoking those letters, and that the executor or administrator may be cited to show cause why a decree should not be made accordingly. * * *

4. Where the grant of his letters was obtained by the false suggestion of a material fact."

It was under this section of the Code that the plaintiff in error moved to have the letters of administration granted to Mrs. Kimball and to Mr. James revoked.

See Petition, Record, p. 3.

There is no allegation in the assignments of error that the grant of letters was obtained by any false suggestion of any material fact. Nor is it alleged in what respect the order of the Surrogate was erroneous. The errors assigned relate generally to the failure of the New York Courts to recognize the validity and binding force of the judgment for divorce, but in what respects they erred or what rule of law they violated, is not alleged. Nor is it alleged in what respect that question arises in connection with the order of the Surrogate from which the appeal was taken. No question is therefore presented to this Court for its decision.

If, however, this Court shall decide to hear the plaintiff in error, then the defendants in error beg leave to submit the following points on the questions raised by the assignments of error.

ARGUMENT.

I.

The findings of fact of the learned Surrogate will be accepted and will not be reviewed by this Court.

St. Louis vs. Rutz, 138 U. S., 226.
Runkle vs. Burnham, 153 U. S., 216.
Egan vs. Hart, 165 U. S., 188.

By Section 9 of Article 6 of the Constitution of the State of New York as amended in 1894, it is provided that after the last day of December, 1895, the jurisdiction of the Court of Appeals * * * shall be limited to the review of questions of law. No unanimous decision of the Appellate Division of the Supreme Court, that there is evidence supporting or tending to sustain a finding of fact or a verdict not directed by the Court shall be reviewed by the Court of Appeals.

Section 191 of the Code of Civil Procedure of the State of New York as amended in 1895, which limits the right to appeal from final orders or judgments, declares in the language of the Constitution that no unanimous decision of the Appellate Division of the Supreme Court that there is evidence supporting or tending to sustain a finding of fact or a verdict not directed by the Court shall be reviewed by the Court of Appeals.

The findings of fact of the learned Surrogate were sustained by the unanimous decision of the Appellate Division of the Supreme Court.

Record p. 67.

They are therefore conclusive on appeal in the Court of Appeals as well as in this Court.

See Opinion of Judge Haight, Record p. 85.

II.

The domicile of both the plaintiff in error and Semon, her husband, was, when the former commenced her action for a divorce in the District Court of North Dakota, in the State of New York.

The Surrogate's finding in respect to Semon's residence at that time is as follows:

"The said James L. Semon is, and ever since his "marriage to the said petitioner has been, a resident of "the State of New York."

Fourth Finding of Fact, Record, p. 55.

In respect to the plaintiff in error the Surrogate finds:

"FIFTH. The said petitioner went to North Dakota on "the 5th day of June, 1890, and stayed there until the "5th of February, 1891. During that period the dom-"icile of her husband was in the State of New York. "The petitioner went to North Dakota *for the purpose "of procuring a divorce from her husband* on grounds "not recognized by the laws of the State of New York "as sufficient cause for granting a divorce."

Record, p. 55.

This last finding of fact of the learned Surrogate, even if it could be reviewed in this Court, is fully supported by the evidence.

The plaintiff in error married Semon in the State of New York on the 12th of May, 1885. He says in the letter hereinafter referred to that he lived there with her and their two children until September, 1888, when she ordered him from the house stating that she never wished to see him again.

Record, p. 40.

She admits that she went to North Dakota on the 5th of June, 1890.

Record, p. 55.

She was required to be in that State for ninety days next preceding the commencement of her action for a divorce.

Laws of North Dakota, Sec. 2578; Record, p. 49.

Almost immediately after the ninety days had expired she commenced the action. The summons was dated September 23, 1890.

Record, pp. 17 & 19.

The decree of divorce was entered in the Clerk's Office, January 29, 1891.

Record, pp. 15 & 16.

She admits that on the 5th day of February, 1891, she left the State of North Dakota.

Record, p. 55.

Although it does not appear where she went after leaving North Dakota, still it will be presumed that she returned to New York, where her mother resided (Record, p. 3), and, as she remained in North Dakota only long enough to procure her divorce, it will be inferred that she intended to obtain the divorce and then return to New York.

Reed vs. Reed, 52 Mich., 117. Opinion by Judge COOLEY.
Neff vs. Beauchamp, 74 Iowa, 92.
Com vs. Kendall (Mass.), 38 N. E. R., 504.

To acquire a new domicile there must be an actual change of residence and an intention of remaining permanently.

But in this case such an intention was wanting.

It is firmly settled that when a married woman goes to another State simply to procure a divorce and return, not intending a permanent change of residence, she does not acquire a new domicile.

Bishop on Marriages, D. & S., Vol. 11, Sec. 102-104.

Neff vs. Beauchamp, *supra.*
The State vs. Fleak, 54 Iowa, 429.
Colburn vs. Colburn, 70 Mich., 647.
Whitcomb vs. Whitcomb, 46 Iowa, 437.
Winship vs. Winship, 1 C. E. Green, 107.
Hall vs. Hall, 25 Wis., 600.
Webraham vs. Ludlow, 99 Mass., 587.
Brown vs. Ashbaugh, 40 How. Pr., 260.
Peralta vs. Peralta, 4 Col., 175.
Sewall vs. Sewall, 122 Mass., 156.

It is now well settled in North Dakota that the plaintiff in a divorce case must show that he or she has acquired a domicile there and that a mere residence even for ninety days is not sufficient to give the Court jurisdiction of the subject matter.

Smith vs. Smith, decided by Supreme Court of North Dakota, Apl. 29, 1898, and reported in 75 North Western R., 783.

It was held in Whitcomb vs. Whitcomb, 46 Iowa, 437, that a temporary residence selected with any other intention than that of making it a permanent domicile is not sufficient even if extended to the full length of time, whatever it may be, required by statute to give the Court jurisdiction of a proceeding for divorce.

III.

The record of the judgment of the Court of North Dakota could be contradicted as to the facts necessary to give the Court jurisdiction, and, if it was shown that such facts did not exist, the record is a nullity, notwithstanding it may recite that they did exist.

Thompson vs. Whitmore, 18 Wall., 457.
Reed vs. Reed, *supra.*
Neff vs. Beauchamp, *supra.*
Com vs. Kendall, *supra*
Adams vs. Adams, 154 Mass., 290.

There is no finding by the Court of North Dakota that the domicile of the plaintiff in error was in that State. All that appears in the record of that Court on that subject is the recital in the decree that " the plaintiff was a resident of Barnes County and State of North Dakota at the commencement of this action and had been for more than 90 days next preceding."

Record, pp. 15 to 26.

In Smith vs. Smith, *supra* (North Dakota case), the Court says:

"The statute requiring residence, which means " domicile for a period of ninety days as preliminary " for starting an action for divorce, *is jurisdictional to* " *the subject matter.* Until this preliminary proof is " made the trial Court obtains no authority to move in " the action. Until this prerequisite is made no law- " ful service of a summons can be made. The Court " itself is in duty bound to see that its own jurisdiction " exists, and for that purpose it should scrutinize the " proof offered on this question with painstaking " fidelity. In a divorce case the sovereign state is " always present as a party in the action, not techni- " cally but actually and potentially a party. The " State represented by the Court is there to see to it " that no mere transient inhabitant whose domicile is " elsewhere shall call upon the Courts of this State to " adjudicate upon the marital relations of citizens of " other states or nations. To do so would not only be " without results except as a purely local affair, but " would be a gross violation of the comity of states and " one directly calculated to make social and " domestic discord and unhappiness to the innocent " parties directly concerned in its action. *The proof* " *of jurisdictional facts should be clear and convincing.* " In the case at bar it falls far short of this."

If the rule laid down in this late case had been followed in the Semon case, the plaintiff in error would doubtless have shown it by the record. She failed to

show that any proof whatever was taken by the Court of North Dakota on the subject of her domicile. Even if the recital in the decree as to her residence was *prima facie* sufficient to show jurisdiction of the Court, it has been contradicted by the facts proved before the Surrogate, which established that her domicile was never changed from New York to North Dakota.

IV.

The judgment of divorce granted to the plaintiff in error from Semon, her husband, by the District of North Dakota, on the 26th of January, 1891, was void, outside of that State, for want of jurisdiction.

1. As to the subject matter :

It is held by numerous cases and may be regarded as settled law that a decree of divorce, granted by the Courts of a State in which neither of the parties was domiciled, is, beyond the limits of such state, a nullity.

Smith vs. Smith, *supra.*
Van Fossen vs. S., 37 Ohio State Reports, 317.
Sewall vs. Sewall, 122 Mass., 156.
Hoffman vs. Hoffman, 46 N. Y., 30.
Hood vs. The State, 56 Indiana, 263.
People vs. McDowell, 25 Mich., 247.
Litowick vs. Litowick, 19 Kansas, 451.

Judge PECKHAM said in Hoffman vs. Hoffman, *supra* :

" For the reason, therefore, that the Court of Indiana " had no jurisdiction of the subject of the action as the " plaintiff in that action was in fact a resident of this " State at the time he claimed to have resided there, " and went to Indiana only to obtain this decree, and " the defendant therein was during all the time a resi- " dent of this State, was never served with process or

" appeared in that action, the decree therein cannot be " enforced here but must be held void."

2. As to the parties:

Irrespective of the question of domicile of the parties, the District Court of North Dakota never acquired jurisdiction of the defendant Semon.

Semon was served with the summons in the State of New York. He was never served in the State of North Dakota, nor did he appear in the action in person or by attorney. Judgment was taken against him by default.

See Original Decree of Divorce, Record, p. 14.

The law of New York has always been that in such a case a judgment of divorce of a Court of another State is null and void for want of jurisdiction, and can be attacked collaterally in the courts of New York.

See Atherton vs. Atherton, 155 N. Y. R., 129, and earlier cases therein cited.

There is no conflict between the decisions of the Courts of New York and of this Court on this subject.

The case in this Court most frequently quoted in this connection in the State Courts is that of Pennoyer vs. Neff, 95 U. S. R., 14. That case is commented on and shown to be consistent with the New York cases, by Judge FOLGER in The People vs. Baker, 76 N. Y. R., 78.

The later cases of Maynard vs. Hill, 125 U. S. R., 190, and Cheely vs. Clayton, 110 U. S. R., 701, are cited in the opinion of Judge BROWN, in Williams vs. Williams, 130 N. Y. R., 193, who says that they do not overturn the decisions of the State of New York, but are in harmony with them.

The point now raised does not seem to have been decided by the United States Courts.

In Laing vs. Rigney, 160 U. S. R., 531, *defendant appeared and answered*, and thereafter a supplemental

bill was filed on which the Chancellor proceeded with the case and rendered judgment without service of a new subpœna within the State, or on the voluntary appearance of the defendant *after* the supplemental complaint was filed. A lawyer testified that in his opinion the Chancellor did not have jurisdiction. This Court held that in the absence of statutory direction or reported decision to the contrary this Court must find the law of New Jersey applicable to the case in the decree of the Chancellor, and that the opinion of an expert could not control the judgment of the Court in this respect, and that the evidence of the defendant did not avail to show want of jurisdiction on the part of the Chancery Court of New Jersey.

It was held in a late case by the Circuit Court of Appeals that an amended personal judgment for alimony allowed in a decree of divorce obtained by default where the defendant was not served with process in the State, and did not appear in the action, could not be enforced in the United States Courts in an action brought for that purpose even when the defendant, relying upon the divorce, had married again, but before the amended judgment was made.

Hikking vs. Plaff, U. S. Circuit Court of Appeals, First Circuit, Opinion not yet reported, but a printed copy is herewith submitted.

Reported below in 82 Federal R., 403.

It has been held by some Courts that a judgment of divorce, obtained without service of process on a non-resident defendant within the State and without his appearance in the case, fixed the marital status of the plaintiff, and that the Courts of other States were bound to recognize such judgments as not only fixing the status of the plaintiff but also that of the defendant as divorced persons, even though the defendant was never subject to the laws of the State in which the divorce was granted.

See Ditson vs. Ditson, 4 R. I., 87.

The better and prevailing opinion seems to be that adopted by the Courts of New York to the effect that such judgments are void outside of the State in which the divorce was obtained, and that each State can determine for itself what the marital condition or status of the parties in such cases shall be so long as they are domiciled within the jurisdiction of its laws. In Dunham vs. Dunham, 57 Ill. Ap., 475, the Court said: "The marriage state is a condition or status. So also "is minority. citizenship, freedom, bondage. These "are each conditions of the individual depending for "their existence upon the laws of the territory in "which the individual is domiciled.

In Strader vs. Graham, 10 How. (U. S.), 82, 93–4, the Court said: "Every state has an undoubted right "to determine the status or domestic and social con- "dition of the persons domiciled within its territory "except in so far as the powers of the states in this "respect are restrained or duties and obligations "imposed upon them by the Constitution of the United "States. There is nothing in the Constitution of the "United States that can in any degree control the law "of Kentucky upon this subject, and the condition of "the negroes, therefore, as to freedom or slavery "after their return, depended altogether upon the law "of that State, and could not be influenced by the laws "of Ohio. It was exclusively in the power of Ken- "tucky to determine for itself whether their employ- "ment in another State should or should not make "them free on their return. The Court of Appeals "have determined that by the laws of the State they "continued to be slaves, and their judgment upon "this point is, upon this writ of error, conclusive upon "this Court and we have no jurisdiction over it."

See also Cheever vs. Wilson, 9 Wall., 108.

It follows, therefore, that the Courts of New York had the exclusive jurisdiction to fix the status of Semon, as the husband of the plaintiff in error, as they

have done in this case, and that the Courts of North Dakota had no power over his status, whatever their power may have been to fix the status of the plaintiff in error in that State.

Prosser vs. Warner, 47 Vt. R., 667.
Thorn vs. Salmonson, 37 Kan., 441.
Cook vs. Cook, 56 Wis., 195.
Irby vs. Wilson, 1 Dev. & B., 568.
Culver vs. Reed, 55 Penn., 375.
Reed vs. Reed, 52 Mich., 117.
Doughty vs. Doughty, 27 N. J. Eq., 315; s. c., 28 N. J. Eq.; 581.
Hunt vs. Hunt, 72 N. Y., R., 217.
Dunham vs. Dunham, *supra.*

3. The affidavit on which the order was made for the service of the summons on the defendant in the divorce case by publication failed to show what diligence, if any, was used to serve the defendant within the State of North Dakota. The statute is not satisfied by the formal allegations in the affidavit that the defendant cannot, after due diligence, be found in the State (see Affidavit of Winterer, Record, p. 20). The Supreme Court of North Dakota has held that a judgment founded on such insufficient service is void.

Beach vs. Beach, 43 N. W. Rep., 701.
Yorke vs. Yorke, 55 N. W. Rep., 1095.

V.

The attempt of the plaintiff in error to cure the jurisdictional defect in the judgment of divorce, by obtaining an amendment thereof, *nunc pro tunc*, was ineffectual.

It should be borne in mind that the original decree of divorce was dated January 26, 1891; that the plaintiff in error went through a marriage ceremony with Kim-

ball in New York in June, 1895; that Kimball died on the 9th of November, 1896; that letters of administration on his estate were issued to Mrs. Kimball, and to Mr. James, on the 10th of November, 1896, and that afterwards, and in December, 1896, nearly six years after the entry of the judgment of divorce, an application, ostensibly on behalf of Semon, was made to the District Court of North Dakota for an order directing that a copy of a certain verified *letter*, alleged by Semon to have been sent by him to the plaintiff's attorneys just after the service of the summons and complaint upon him in 1891, be filed, *nunc pro tunc*, as of Januaay 26, 1891, and also amending the judgment in the divorce suit *nunc pro tunc* as of the same date, so that it should recite that the defendant James L. Semon had appeared at that time in the suit, and had answered and submitted himself to the jurisdiction of the Court, and by striking out from the judgment the recital that he had made default.

This application was based upon a petition of Semon, upon which the District Court made an order requiring the plaintiff in error, or her attorneys, to show cause why the prayer of the petition should not be granted. The petition stated that Semon, "desir-" ing to appear in said action, and to answer said com-" plaint as required by said summons, did prepare, " make and sign his answer to the said complaint, and " did subscribe and swear to the same, and did serve " the same by mail on the plaintiff's attorneys, Win-" terer & Winterer; that he prepared and sent said an-" swer without aid or advice, and without consultation " with any counsellor or attorney at law, to avoid the " expense thereof;" that he "intended said answer to " be filed in court as part of the proceedings in said " divorce suit, but had recently learned that this had " not been done, but that judgment had been entered " against him by default." Annexed to this petition was what was stated to be a copy of the "Answer" (Record, p. 40). It is marked "A" and is in the form

of a letter addressed to Herman Winterer, and purports to be sworn to. It denies the plaintiff's allegations of desertion, non-support and intemperance. The original of this letter was not produced, but Herman Winterer made affidavit, on December 11th, 1896, that the Exhibit A annexed to Semon's petition *is a true and correct copy of the original received by him on or about October 28th, 1890, more than six years before; and that the original cannot be found, but was either lost or destroyed.* He further swears that the original letter was not filed with the records in the divorce suit, because *it was not in the form of a pleading under the requirements of the statute of the State of North Dakota* (Record, p. 33). It is a noticeable fact that this letter was addressed to Herman Winterer, although there was nothing in the papers that were served on Semon to inform him, at the time he alleges that he wrote and sent the letter, that there was such a person as Herman Winterer. The summons required an answer to be served on " Winterer & Winterer " (Record, p. 16).

Upon this application, and without notice to any one other than the lawyers who about six years before had appeared as the attorneys for the plaintiff in error, the Court made an order, dated December 16, 1896, granting the prayer of the petition and ordering " the copy of defendant's letter, dated October 23, 1890, directed to Herman Winterer," to be filed in said divorce suit as of the date of its receipt, and the decree of January 26, 1891, to be amended *nunc pro tunc* as of that date, by striking out the recitals of the defendant's default, and by inserting in their place, " the defendant having appeared herein and answered and submitted himself to the jurisdiction of the Court." No one appeared on the motion for the plaintiff in error.

See Order, Record, p. 32.

The very next day after the entry of this order in North Dakota the plaintiff in error presented her petition to the Surrogate's Court of the County of Kings,

alleging that she was the widow of Kimball; that the letters of administration theretofore granted to Mrs. Kimball and Mr. James were granted upon a deliberately false statement that the deceased was "unmarried at the time of his death and left him surviving no widow," and praying that those letters be revoked, and that letters of administration be issued to her as the widow of the deceased.

Record pp. 32–43.

Upon this state of facts the Surrogate, who evidently did not believe the story, found as matter of fact that Semon had not appeared in the divorce suit.

Surrogate's 4th Finding of Fact, Record p. 55.

See Kerr vs. Kerr, 41 N. Y. R., 272.

The Eighth Finding of the Surrogate is in no respect in conflict with the former finding of non-appearance; it is merely a statement as to the character of the application subsequently made by Semon to the Dakota Court, namely, "that the said James L. Se-"mon applied to the Court of North Dakota which "granted the decree of divorce to have a letter which "he sent to the plaintiff's attorneys * * * filed in "said Court as his answer." This is not a finding that such a letter was actually sent by Semon, but only that he made an application to the Court to have a copy of a letter, which in his petition in that application he stated he had sent, placed on file, etc. The Surrogate was evidently convinced that no such letter was sent at the time alleged, and that the whole story was an afterthought fabricated by Semon and his wife to bolster up her application for letters of administration and to enable her to get Kimball's property. This was also the view taken by the Appellate Division of the Supreme Court. Presiding Justice GOODRICH, in his opinion, says:

"It is, at least, a very curious suggestive coinci-"dence that as soon as the validity of the appellant's

" divorce had been practically attacked by the granting
" of letters of administration to the next of kin, the
" former husband of the appellant at once applied for
" an amendment of the decree which adjudged him
" guilty of moral obliquity in failing to discharge his
" marital obligations, not for the purpose of having it
" vacated and being relieved from the imputation which
" it carried, but to give life and force to the charges
" against himself, and for this purpose submit himself
" to the jurisdiction of the Court and assent to the
" judgment. The story of his appearance and answer
" is apocryphal and challenges credulity, and the Sur-
" rogate appears to have been of this opinion."

Record, p. 69.

If the question of the non-appearance of Semon in the divorce suit is one of fact, then the question is a closed one in this Court because the finding of the trial Court is conclusive and this Court will not review it.

See cases cited under Point I.

If it is a question of law, and as such can be examined in this Court, then the answer to it is found in the learned opinion of Judge HAIGHT of the Court of Appeals.

Record, p. 82.

VI.

But the relief to which Semon was entitled, if his story can be believed, would not allow the judgment to be amended *nunc pro tunc*.

" It must be observed that the entire purpose of en-
" tering judgments and decrees as of some prior date
" is to supply matters of evidence, and not

"to supply or modify matters of fact. The failure "of a Court to act or its incorrect action can never "authorize a *nunc pro tunc* entry. If a Court does "not render judgment, or renders one which is imper- "fect or improper, it has *no power* to remedy any of "these errors or omissions by treating them as clerical "misprisions."

Freeman on Judgments, 4th Edit., Sec. 68.
Gray vs. Brignardello, 1 Wall., 627, 636.
Mitchell vs. Overman, 103 U. S., 62, & cases cited in note at page 66.
Cassidy vs. Woodward, 77 Iowa, 354.
Woolridge vs. Quinn, 70 Mo., 370.
Garrison vs. People, &c., 6 Neb., 274.

If it be conceded that Semon had really served an answer which had been suppressed, it is clear *that he had not at that time waived his right to insist upon his defense, and to have the issues in the suit regularly tried;* such a waiver was not even impliedly made before December, 1896, and the amendment purporting to adjudge in effect that he had waived his rights in this respect at the time the original judgment was entered in January, 1891, is contrary to the facts as they then existed, does not express the truth and was beyond the power of any Court to make. All that Semon was entitled to under any circumstances, upon his own statement, was to have the judgment against him vacated and to be heard in his own defense.

Yorke vs. Yorke *(supra).*

The Code of North Dakota of 1895 contains the following provisions (Record, p. 51):

Sec. 5415. Origin and classes of issues.

Issues arise upon the pleadings when a fact or conclusion of law is maintained by one party and controverted by the other. There are two kinds:

1. Of law.
2. Of fact.

Sec. 5417. Of fact classified.

The issue of fact arises upon the material allegations of the complaint controverted by the answer.

Sec. 5419. Trial defined. A trial is the judicial examination of the issues between the parties whether they are issues of law or of fact.

Sec. 5421. Issues of fact—how tried. All issues of fact triable by a jury or by a Court must be tried before a single Judge. Issues of fact must be tried at a regular term of the District Court when the trial is by jury, otherwise at a regular or Special Term as the Court may by its rules prescribe.

Sec. 5422. Note of issue, &c. {At any time after issue, and at least ten days before the Court either party may give notice of trial. The party giving the notice shall furnish the Clerk at least eight days before the Court with a note of the issue containing the title of the action, &c.

Sec. 5423. Either party proceeds, &c.

Either party, when the case is reached upon the calendar and in the absence of the adverse party, unless the Court, for good cause, shall otherwise direct, may proceed with his case and take a dismissal of the complaint or a verdict or judgment, as the case may require.

Sec. 5479. Judgment may be entered by the Clerk on order.

Judgment upon issue of law or fact or upon confession, or upon failure to answer, may be entered by the Clerk upon order of the Court or of a Judge thereof.

Sec. 5480. Prescribes that notice of entry of judgment shall be served on the adverse party.

Sec. 5489. Prescribes what the judgment roll shall contain.

Record, pp. 52, 53.

Whatever judgment was obtained by either party could have taken effect only from the time of its actual entry, which could not have been earlier than Decem-

ber, 1896, after Kimball had died, and letters of administration on his estate had been granted.

VII.

The Court had no power to make the amended decree for another reason.

Section 2744 of the Revised Code of North Dakota of 1895, provides that a divorce must be denied on showing collusion, and Section 2746 provides that "Collusion is an agreement between husband and wife "that one of them shall commit, or appear to have "committed, or to be represented in Court as having "committed acts constituting a cause of divorce for "the purpose of enabling the other to obtain di-"vorce."

Record, p. 48.

The object of making the application to amend the decree of divorce was stated in Semon's petition to be to give the decree validity outside of North Dakota so as to enable him to marry again.

Record, p. 57.

He admitted the invalidity of the original decree (Record, p. 37), and by waiving his right to try the issues of fact raised by his so-called answer, he impliedly admitted the allegations in the complaint charging him with acts constituting a cause for divorce in North Dakota. If this were not so, the Court could not, of course, without a trial, have found the facts on which the amended decree rested.

This seems to have been a clear attempt on Semon's part to be "represented in Court as having committed "acts constituting a cause for divorce, for the purpose

" of enabling the other to obtain a divorce," and it was the duty of the Court under Section 2744 to deny the application, and as the question is one which relates to the power of the Court it can be raised in this case.

VIII.

The North Dakota Court had not the power to amend its judgment so as to affect or impair the rights of the defendants in error which accrued prior to the date when the order amending the judgment was made.

The defendants in error have shown that the original judgment of divorce was invalid for want of jurisdiction. Before an attempt had been made to give it validity by the application to amend it, Kimball had died and Mrs. Kimball, his mother, and Mrs. James, his sister, as his only heirs at law and next of kin, had become vested with the right of inheritance, and had entered into possession of his property. Mrs. Kimball and Mr. James, as administrators of his estate, had entered upon the discharge of their duties, exercising the powers and incurring the liabilities incident to that office.

Notice of the application to amend the decree was not given to either of them nor did they have an opportunity to be heard. The amendment which was sought to be made was not one to correct a mistake in a case where the Court had full jurisdiction. As already stated, it was an attempt to give jurisdiction to the Court after rights of third parties had intervened.

Whatever the effect of the amendment may be as between Semon and the plaintiff in error it could not de-

stroy or take away the rights of property of the defendants in error.

Ex parte Buskirk, 72 Fed. R., 14.
Weeks vs. Jones, 16 Hun, 349; Affd. 76 N. Y., 601.
Vroom vs. Ditmas, 5 Paige, Ch. R., 528.
Koch vs. Atlantic, &c., R., 77 Mo. R., 354.
Acklen vs. Acklen, 45 Ala. R., 609.
Jordan vs. Petty, 5 Fla. R., 326.
McCormick vs. Wheeler, 36 Ill., 114.
Small vs. Donthitt, 1 Kan. R., 335.
Graham vs. Lynn, 4 B. Mon. (Ky.), 18.
Galpin vs. Fishburne, 3 McCord (S. C.), 22.
Hays vs. Miller, 1 Wash. Ty., 143.
Hekking vs. Plaff, *supra.*
Smith vs. Hood, 25 Pa. St., 218.
See, also, cases cited in 20 Lawyers' Rep. An., 146, note.

The power of the Courts of North Dakota to amend judgments is very similar to that possessed by the Courts of New York.

Code of North Dakota, Sec. 4938 (Record, p. 51), is as follows:

SEC. 4938. The Court may, before or after judgment, in furtherance of justice and on such terms as may be proper, amend any pleading, process or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect; or by inserting other allegations material to the case; or when the amendment does not change substantially the claim or defense by conforming the pleading or proceeding to the facts proved.

Civil Code of Procedure of New York, Sec. 723, is as follows:

The Court may, upon the trial, or at any other stage of the action, before or after judgment, in furtherance of justice, and on such terms as it deems just, amend any process, pleading or other proceeding by adding or striking out the name of a person as a party,

or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting an allegation material to the case; or where the amendment does not change substantially the claim or defense by conforming the pleading or other proceeding to the facts proved. And, in every stage of the action, the Court must disregard an error or defect, in the pleadings or other proceedings, which does not affect the substantial rights of the adverse party.

It is well settled by the New York cases that such an amendment as the Court of North Dakota made could not affect or impair rights which had accrued prior to the amendment.

Weeks vs. Jones, *supra*.
Bank of Rochester vs. Emerson, 10 Paige, 359.
Stuart vs. Palmer, 74 N. Y., 183.
Butler vs. Lewis, 10 Wend., 541.
Davis vs. Morris, 21 Barb., 152.
Boyden vs. Johnson, 11 How. Pr., 503.
Johnson vs. Fellerman, 13 How. Pr., 21.
Van Beck vs. Shuman, 13 How. Pr., 472.
Allen vs. Smillie, 12 How. Pr., 156.
Buchan vs. Sumner, 2 Barb. Ch., 165.
McKee vs. Tyson, and note, 10 Abb. Pr., 392.
Lawless vs. Hackett, 16 Johnson, 149.
Hammond vs. Rush, 8 Abb. Pr., 152.
Roberge vs. Winnie, 75 Hun., 597.
Rockwell vs. Carpenter, 25 Hun, 529, see Opinion of BOARDMAN, J., at page 535.
Cook vs. Whipple, 55 N. Y., 150.
Symson vs. Selheimer, 105 N. Y., 620 and 660.

IX.

Neither the constitutional provision that full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other

State, nor the Act of Congress passed in pursuance thereof, prevents an inquiry into the jurisdiction of the Court by which a judgment offered in evidence was rendered: and want of jurisdiction may always be interposed by third parties against a judgment when it is sought to be enforced or when any benefit is claimed from or under it.

Thompson vs. Whitmore, 18 Wall., 456.
Simmons vs. Saul, 138 U. S., 439.

X.

If the foregoing points are well taken it follows:

1st, That the District Court of North Dakota did not have jurisdiction to make the original judgment of divorce or the amended judgment, and that the Courts of New York did not err by refusing to recognize such judgments as dissolving the marriage relation between the plaintiff in error and Semon in the State of New York.

2d That the plaintiff in error was Semon's wife when she entered into the marriage ceremony with Kimball, and that that ceremony did not make her Kimball's wife.

3rd. That she is not Kimball's widow, and has no right to administer on his estate, and that the Surrogate was right in denying her motion.

Adams vs. Adams, 154 Mass., 290.

It is respectfully submitted that the order of the Court below should be affirmed.

LEMUEL H. ARNOLD,
For Defendants in Error.

KIMBALL *v.* KIMBALL.

ERROR TO THE SURROGATE'S COURT OF THE COUNTY OF KINGS, STATE OF NEW YORK.

No. 248. Argued April 19, 1899. — Decided May 1, 1899.

If the petition of a woman, claiming to be the widow of a man supposed to have died intestate, for the revocation of letters of administration previously granted to his next of kin, and for the grant of such letters to her, is dismissed by the surrogate's court upon the ground that a decree of divorce obtained by her in another State from a former husband is void; and she appeals from the judgment of dismissal to the highest court of the State, which affirms that judgment; and, pending a writ of error from this court, it is shown that a will of the deceased was proved in the surrogate's court after its judgment dismissing her petition, and before her appeal from that judgment; the writ of error must be dismissed.

THE statement of the case is in the opinion of the court.

Mr. George Bell for plaintiff in error. *Mr. Waldegrave Harlock* was on his brief.

Opinion of the Court.

Mr. Lemuel H. Arnold for defendants in error.

Mr. Justice Gray delivered the opinion of the court.

This action was begun December 18, 1896, by a petition of Maude E. Kimball, claiming to be the widow of Edward C. Kimball, (who resided in Brooklyn, and died there, without issue, on November 9, 1896,) to the surrogate's court of the county of Kings in the State of New York, praying that letters of administration granted by that court on November 10, 1896, to his mother and his brother in law, upon a petition representing that he died intestate and unmarried, be revoked, and that this petitioner be appointed administratrix.

The administrators previously appointed, being cited to show cause why the prayer of her petition should not be granted, filed an answer, denying that she was the widow of the deceased.

At the hearing in the surrogate's court, it was proved and admitted that Edward C. Kimball and the petitioner went through the ceremony of marriage at Brooklyn on June 29, 1895; that she had been married on May 12, 1885, to James L. Semon in the city of New York; that on September 25, 1890, she commenced a suit against Semon in a court of the State of North Dakota for a divorce on the ground of his desertion; that the summons in that suit was not served upon him in North Dakota, but was served upon him in the State of New York on October 15, 1890; that on January 26, 1891, that court rendered a decree of divorce against him as upon his default; that she was living in North Dakota from June 5, 1890, to February 5, 1891; that when she brought her suit for divorce, and ever since, Semon was a resident of the State of New York; and that on December 16, 1896, that court, upon his application and after notice to her, amended the decree of divorce by striking out the statement of his default, and by stating, in lieu thereof, that he had appeared and answered in the suit. Copies of the record of the proceedings for divorce were produced; and the principal matter contested in the surrogate's court was the validity of the divorce.

The surrogate's court held that the decree of divorce and the marriage of the petitioner to the intestate were absolutely void at the time of his death, and were not rendered valid by the subsequent amendment of the decree of divorce; and by a decree dated March 8, 1897, adjudged that the petitioner was not the widow of Edward C. Kimball, nor entitled as such to letters of administration of his estate; and further adjudged that her petition be dismissed. On April 5, 1897, the petitioner appealed from that decree to the Appellate Division of the Supreme Court of the State of New York, which on June 22, 1897, affirmed the decree. *In re Kimball*, 18 N. Y. App. Div. 320. From the decree of affirmance, the petitioner on August 19, 1897, appealed to the Court of Appeals of the State of New York; and that court, on February 4, 1898, affirmed the decree, and ordered the case to be remitted to the surrogate's court. 155 N. Y. 62.

The petitioner sued out this writ of error, and assigned for error that the courts of New York had not given due faith and credit to the decree of the court of North Dakota.

The writ of error was entered in this court on February 21, 1898. On March 22, 1898, the defendants in error moved to dismiss the writ of error, because of the following facts, proved by them, and admitted by the plaintiff in error, namely: On March 25, 1897, on a petition of the mother and sister of Edward C. Kimball, representing that his last will and testament, dated July 7, 1890, devising and bequeathing to them all his property, real and personal, and appointing them executrices thereof, had just been found, the surrogate's court, upon due proof of its execution and attestation, entered a decree admitting the will to probate, ordering letters testamentary to be issued to the executrices, and revoking the letters of administration which had been granted to the mother and the brother in law on November 10, 1896. The entry of the decree of March 25, 1897, was notified by the counsel of the present defendants in error to the counsel of the plaintiff in error on the day on which it took place.

The motion to dismiss was opposed by the plaintiff in error, upon the grounds that the judgment below involved a Federal

question within the jurisdiction of this court; that a dismissal of the writ of error would leave the plaintiff in error bound by the adjudication below that she was not the widow of the deceased; that the admission of the will to probate had no bearing on the question before this court; and that the defendants in error had been guilty of laches in not sooner making a motion to dismiss.

The consideration of the motion to dismiss the writ of error was postponed until the hearing upon the merits, and now presents itself at the threshold.

The rule which must govern the disposition of this motion has been often stated and acted on by this court.

In a comparatively recent case, pending a writ of error to reverse a judgment for a railroad corporation in an action against it by a State to recover sums of money for taxes, it was shown that the defendant had made a tender of those sums to the State, and a deposit of them in a bank to its credit, which by statute had the same effect as actual payment and receipt of the money. Stipulations had been made in other similar cases that they should abide the judgment of this court in this case; and the Attorney General of the State contended that a determination of the question whether the tax was valid was of the utmost importance to the people of the State. But this court dismissed the writ of error, saying: "The duty of this court, as of every judicial tribunal, is limited to determining rights of persons or of property, which are actually controverted in the particular case before it. When, in determining such rights, it becomes necessary to give an opinion upon a question of law, that opinion may have weight as a precedent for future decisions. But the court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it. No stipulation of parties or counsel, whether in the case before the court or in any other case, can enlarge the power or affect the duty of the court in this regard." *California* v. *San Pablo & Tulare Railroad*, 149 U. S. 308, 314.

Again, in a still more recent case, this court, upon a review of the previous decisions, said: "The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal." *Mills* v. *Green*, 159 U. S. 651, 653.

From the necessity of the case, this court is compelled, as all other courts are, to allow facts which affect its right and its duty to proceed in the exercise of its appellate jurisdiction, but which do not appear upon the record before it, to be proved by extrinsic evidence. *Dakota County* v. *Glidden*, 113 U. S. 222, 225, 226; *Mills* v. *Green*, above cited.

The reasons are quite as strong, to say the least, for applying the rule to a writ of error to a state court, on which the jurisdiction of this court is limited to Federal questions only, as to a writ of error to a Circuit Court of the United States, on which the jurisdiction of this court extends to the whole case. The rule was applied to a writ of error to the Court of Errors and Appeals of the State of New Jersey in *Little* v. *Bowers*, 134 U. S. 547.

In the present case, the subject matter of the petition to the surrogate's court, and the only relief which could be granted upon that petition, were the revocation of the letters of administration previously issued to the mother and the brother in law of the deceased, and the grant of new letters of administration to the petitioner. The decree admitting the will to probate, in terms, revoked the former letters of administration, and, by its legal effect, superseded the necessity and the possibility of granting any letters of administration as of an intestate estate to the petitioner or to any one

else. New York Code of Civil Procedure, §§ 2476, 2626, 2684. The whole subject matter of the writ of error is thus withdrawn, and the writ of error must be dismissed for want of anything upon which it can operate. *Chicago & Vincennes Railroad* v. *Fosdick*, 106 U. S. 47, 84; *San Mateo County* v. *Southern Pacific Railroad*, 116 U. S. 138; *Washington Market Co.* v. *District of Columbia*, 137 U. S. 62.

The question whether the petitioner was or was not the widow of the deceased, whatever importance it may have in the determination of other controversies in which she may be interested, is a moot question in this case in the present condition of things; for, however that question should be decided, the petitioner cannot obtain letters of administration, and the letters of administration granted to other persons have been revoked.

The objection of laches is of no weight. No consent of parties can authorize this court to exercise jurisdiction over a case in which it is powerless to grant relief. *Little* v. *Bowers*, 134 U. S. 558, 559; *California* v. *San Pablo & Tulare Railroad*, above cited. The probate of the will was granted, and was known to both parties to this suit, ten days before the petitioner appealed from the decree of the surrogate's court. Yet neither party appears to have requested the surrogate to modify the form of his decree against the petitioner. Had the probate of the will been brought to the notice of either of the appellate courts of the State of New York, that court might probably have dismissed the case, for the reason that its decision could not be made effectual by a judgment. *People* v. *Clark*, 70 N. Y. 518, 520. The neglect of both parties to bring that fact to the notice of those courts affords no reason for this court's assuming to decide a question, the decision of which cannot affect the relief to be ultimately granted in this case.

Writ of error dismissed.